ISLAMIC JURISPRUDENCE
IN THE
MODERN WORLD

(A REFLECTION UPON COMPARATIVE STUDY OF THE LAW)

BY

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PREFACE

A wealth of literature exists on the Sharia in the Arabic language and commendable works have been published in various languages. This work is an humble attempt with a view to appraise and elucidate the principles of Islamic Jurisprudence. It also points out the comparable features of other systems.

The book is intended to inculcate an understanding of the Islamic Legal Institutions in the close-knit world of today, specially in the case of those who, in the absence of a proper appreciation of the nature and development of these Institutions, look upon them as something out-dated. For such a purpose, I have made an effort to present an analytical, suggestive and comparative study of the Sharia provisions with the Anglo-American Common Law, the European Civil Law and others. Further, the needs of a sincere student and the difficulties of the legal profession as felt on my personal experience at the Bar may be lessened through the citations of the textual and original authorities of the Sharia. The functional aspect of the law has been stressed by reference to important and to-date cases of the Islamic and other systems.

I wish to express my thanks to Al-Haj Dr. Hafeezul Rahman, Professor and Dean of the Faculty of Law, Aligarh Muslim University for the encouragement given to me in bringing out this work and to my wife Ayesha Qadri are special regards for helps in proof corrections.

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ALIGARH, U.P., (India).
April, 1963.

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Introduction

§ I Customs and Usages in Pre-Islamic Arabia

ARABIA AND THE ARABS

Arabia is a vast peninsula in the South-West of Asia. It is bounded on the North by the great Syro-Babylonian plain, North-East by the Persian Gulf and the sea of Oman, South or South-East by the Indian Ocean, and South-West by the Red Sea and Gulf of Suez. It exhibits a central table-land surrounded by a series of deserts with numerous scattered oases. Like the Sahara it has its wastes of loose sand, its stretches of bare rocks and stones, its mountains devoid of vegetation, its oases with their wells and streams, their palm-groves and cultivated fields look like islands of green amidst the surrounding desolation.

The climate of the country in general is marked with extreme heat and dryness. The produce and cattle are restricted to coffee, dates, gums, horses, camels and petroleum. The inhabitants are called Arabs, who as a race, are of middle stature, of a powerful though slender build. They are naturally active, intelligent and courteous, and their character is marked by temperance, bravery and hospitality. The nomadic Arabs live in tribes called Bedouins.[1]

RELIGIOUS BELIEFS

The history of Arabs previous to Islam is obscure. Yet the earliest inhabitants are believed to have been of the Semitic race. The people of the time believed in different religions. Some of them believed in God, some were idolators, worshipping the fixed stars and planets, the Angels and their images with some-what peculiar objects of worship which differed from tribe to tribe. There were also some who did not believe in any religion

1 See, Pears Cyclopoedia (68th Ed.).

at all. The Christians occupied scope in the country in the 3rd century A.D., and the Jews in the 5th century A.D.

CONSTITUTION OF SOCIETY

The Arab society was generally nomadic, divided into tribes, sub-tribes and families. The population was either of the city dwellers or the desert nomads called Bedouins. The tribes worked as a unit and each tribe elected its own chief. The election of the chief was generally based upon the nobility of birth, age, reputation and courage.[2] The main function of the chief was to represent his tribe in relation to other tribes. Though there was no fixed machinery to enforce his orders and opinions, as there was no constituted state, yet the enforcement was made by the tribal opinion. Offenses were generally related to the tribe as a whole. If a member of one tribe killed or injured a member of another tribe, the heirs or the chief of the injured were entitled to demand that the offender should be given up to them to suffer retaliation, or the matter might be settled by compensation or payment of a fine depending upon the seriousness of the offence.[3] The absence of an organized political authority, implied also the absence of an organized judicial system, and the ultimate result of it was that generally private justice was administered by the appointment of an arbitrator called *Hakam*, chosen upon his qualities of wisdom, reputation and the like.[4]

2 R. Levy, Sociology of Islam I, 76, 276 etsq.; Abdur Rahim, Mohd. Jurisprudence, 3.

3 Abdur Rahim, 4; Compare Maine, Ancient Law, Ch. X; Diamond, Primitive Law (1935); see also Malinowski, Crime and Custom in Savage Society (1932); Llewellyn and Hoebel, The Cheyenne way-conflict and case Law in Primitive Jurisprudence (1941).

4 Prof. Schacht in Law In the Middle East, 29; Prof. Hafeezur Rahman, The Origin And Development of the Sunni School of Muslim Jurisprudence, 2 (1952).

CUSTOMS AND USAGES

Punishment : The Ancient Indian and Anglo-Saxon laws and customs, along with others, bear an interesting similarity when they are compared with the customs and usages of the pre-Islamic Arabia. It is generally found that the early form of legal procedures were based on vengeance and the modern writers think further that the Roman and the German Laws started from the blood-feud.[5] The principal form of punishment in the pre-Islamic Arabia for crimes against persons was retaliation commutable to the payment of blood-money.[6] If a member of an inferior tribe murdered a member of a nobler tribe the latter would exact the blood of two men in lieu of one, of a male in lieu of a female, of a freeman in the place of a slave.[7] The infliction of retributive punishment such as the cutting the hands of the thief and of blackening the face of the adulterer were the other modes prevalent in the country.[8]

Sexual Relations : The customs which regulated the relations of man and woman and the status of the children, were primitive, and uncertain. There were four varieties of marriages :

(1) A form of marriage which had been approved and sanctioned by Islam was in which a man asked another person for the hand of the latter's daughter in marriage upon an amount of dower ;

(2) A man desirous of a nobler offspring asked his wife to "send for so and so (naming a famous man) and have intercourse with him." During the period of such sexual connexion the husband would remain separated and returned

5 Holmes, The Common Law, I.

6 Abdur Rahim, 6.

7 Ibid. Citing Tafsiri-Ahmadi, 57.

8 Kashful - Ghumma II, 105-106; compare Hogbin, Law and Order in Polynesia (1934); see also Paton, Jurisprudence 30 estq.

after the pregnancy became apparent ;[9]

(3) A number of men, less than ten, used to go to a woman for sexual relations. Upon her conceiving and after the delivery of a child, she would call the men. Upon their assemblance, she addressed them saying, "you know what has happened. I have now brought forth a child. O so and so? (naming whomsoever of them she chose), this is your son." The child was then ascribed to him without any option to disclaim its paternity ;

(4) Prostitution was in much practice and upon the conception of any prostitute, the persons frequently visiting her were called upon and assembled and physiognomists used to decide the paternity of the child.[10]

Temporary or Muta marriages were also in vogue, as, "when a man came to a village and he had no acquaintance there (to take care of his house), he would marry a woman for as long as he thought he would stay, so that she would be his partner in bed and take care of his house "[11]

In the regular form of marriage, the provision of dower was in practice, and in some cases the guardian of the girl used to take it for himself.[12] To deprive the wife of her dower, a device of *Shighar* marriage was practised, by which the hands of a sister or daughter was given in exchange of marriage by one party to the hands of the sister or daughter of the other party. For example a Hebrew girl was like a servant in her father's house, saleable or exchangeable at

9 Compare the Niyoga usage of Ancient Hindu Law, see Mayne. Hindu Law and Usage, 112, 117 (1950) ; see also Dr. Jolly, History of Hindu Law, 155 etsq (for its similar existence in Germany) ; Manu prohibited the usage by saying "By twice-born men, a widow must not be appointed to co-habit with any other than her husband ; for they who appoint her to another man will violate the eternal law." IX. 64 quoted by Mayne, op. cit. 117.

10 Kashful-Ghmma II. 105-106; R. Levy, I. 168, 194.

11 Fathul-Qadir, III. 151 ; Abdur Rahim 8.

12 Tafsir-i-Ahmadi, 226; Abdur Rahim, 8.

any time.[13] The will or consent of women had no place in the contract of marriage, but instead it all depended upon the father, brother, cousin or any other male guardian. No restriction was imposed upon the number of wives, and the only form of prohibited degree of relationship in marriage was consanguinity.

The husband possessed the power to release himself from the wife through divorce at any time and even without any reason. He may revoke the divorce and resume cohabitation and again divorce and again cohabit and so could repeatedly do so with impunity.[14]

The status of legitimacy was largely dependent upon the form of marriage. In regular marriages, the status was accomplished by the establishment of descent, but in other irregular sexual relations, it was the right of the mother to affiliate the child to any person with whom she had the sexual connexions. Owing to the low position of women, female infanticide was greatly in vogue, without any legal safeguard.

PROPERTY RELATIONS

Justice Abdur Rahim has given an account of the tenure of property, power of alienation, sale, succession and inheritance, and upon a review of these relations, it is submitted that all was in a stage of primitive darkness, unfixed and unsettled. Proprietorship was individual without any distinction between ancestral or self-acquired property. With few exceptions of public places of worship, no public property existed. An owner was possessed of absolute power of disposition regarding his property, which consisted generally of camels, cattle, tents, clothes with land and houses situated in towns.[15] A female was a mere chattel,

13 Kashful-Ghumma II. 52 ; Ameer Ali, Mohd. Law, II. 15.

14 Tafsir-i-Ahmadi, 130 ; Encycl. of Islam, III. 636 ; R, Smith, Kinship, 83.

15 Abdur Rahim, 12 etsq.

being considered as an integral part of the estate of her husband or guardian. Though they could hold property but there was no legal safeguard for their interests. The theory of blood-feud and revenge was largely responsible for the distribution of inheritance and upon this basis only agnates with physical power having near ties of blocd were entitled to inheritance with the total exclusions of the cognate and weak relations. Even the customs provided the devolutions of the widows of a man to his sons by rights of inheritance similar to any other portion of his patrimony.[16]

REFORMS OF ISLAM

Under such conditions, the religion of Islam took birth and the principles of municipal law as an integral part of a comprehensive scheme of Universal religion propounded by the prophet of God—Muhammad (May God bestow His blessings upon him) was originated. The Prophet through the Islamic religion introduced far-reaching reforms into the barbarous and primitive modes of lives of the people. In judging the conditions for which the reforms of Muhammad were introduced, some critics of the West ignore the aggravating circumstances and conditions from which he raised the country. They forget that many institutions, such as polygamy, slavery, which they condemn were really not introduced by Islam but were only tolerated and reformed.[17] The Prophet in order "to introduce a purer Faith and healthier organization among his people, did not so entirely overlook the exigencies of society and the requirements of human growth as to denounce all existing institutions, the inevitable result of which would have been to reduce everything to choas" ; for these reasons he tolerated them with such amendments and alterations so as to bring them into harmony with a progressive society and needs of national and individual progress.[18] The reasons

16 Ameer Ali, Mohd. Law, II. 15.
17 Browne, A Lit. History of Persia (until Firdawsi), 186.
18 See Ameer Ali, II. 1-2 ; The Spirit of Islam Ch. V. (1923).

of the Quranic legislations through the medium of the Prophtet were due to the dissatisfaciions with the prevailing conditions; the tendency to improve the position of women and of the weak in general and the desire to mitigate the practice of vengeance and retaliation, the prohibitions of wine drinking. gambling, and taking of interest too, constitute a break with Arabian standard behaviour of the rule of human conduct.[19] It was the religion of Islam which ameliorated the lot of the women-folk by raising their standard with adjusting it to the actual changes of life and modes of living and the Islamic reforms marked a new departure in the history of the Eastern legislation.[20] The Quranic legislation in the field of inheritance was upon a subject-matter farthest removed from the action of moral principle, and most closely connected with the granting of individual rights, for tbe Quran lays down the rules of action regarding the estates of deceased persons, the ethical element appears in the urgent injunction to act justly in making wills, and generally in the tendency to allot shares in the inheritance to persons who had no claims to succession under the old customary law.[21] For it has been said well that, " Personal courage, unstinted generosity, lavish hospitality, unswerving loyalty to kinsmen, ruthlessness in avenging any wrong or insult offered to one's self or one's relations or tribesmen (without any consideration for the changing times): these were the cardinal virtues of the old pagan Arab, while resignation, patience, sub-ordination of personal and tribal interests to the demands of a common faith, unworldliness, avoidance of obstation and boastfulness, and many other things enjoined by Islam were merely calculated to arouse his derision and contempt."[22]

19 Prof. Schacht in Law In the Middle East, 32.
20 Ameer Ali, II. 472; The Spirit of Islam, Ch. V.
21 Prof. Schacht in Law In the Middle East, 32-33.
22 Browne, A Lit. History of Persia (until Firdawsi), 190-191 citing

§ 2 Scope and Nature of Islamic Jurisprudence

NATURE OF GENERAL JURISPRUDENCE AND COMPARATIVE LAW

'Jurisprudence' is called a particular method of study not of the law of an only country, but the general notion of the law covering systems of all civilized countries.[23] Jurists of different eras, countries and thoughts define the term differently. As for exemple, Maine defined it in the terms of history, Holmes in terms of experience, Austin in terms of positive command of the sovereign power and Pound, the foremost architect of the American law in terms of the functional or social basis of the law securing of the maximum wants and their satisfaction.[24] Hence the "efforts to arrive at generalizations about law, including those having a sociological, psychological, historical, analytical or metaphysical point of departure, are collectively referred to under the heading of Jurisprudence"; for "virtually all schools of jurisprundence - resort to comparative studies as part of their own jurisprudential efforts, in order (a) to determine the importance and universality of the problems to be explored, (b) to find concrete illustrations of abstract theories, and (c) to test the validity of general hypotheses against the realities of more than one legal system."[25]

However, under the stretching definitions of the term

Goldzihar's Muhammadanische Studien. The bracketed portions supplied; See also Prof. Hafeezur Rahman, The Origin and Development of the Sunni School of Muslim Jurisprudence, 5-6 (1952)

23 Paton, Jurisprudence, 2.

24 See Maine, Ancient Law (1916); Holmes, The Common Law (1881); Austin, Jurisprudence, I. (1885); Pound, Interpretation of Legal History (1923).

25 Schlesinger, Comparative Law, etsq. 28-29 (1959); note him in 'Research on the General Principles of Law Recognized by Civilized Nations,' 51 Am J. Int L. 734 (1957); Winfield, "Law Reform" in L. Q. R 300-304 (July, 1928).

great controversies are bound to occur, resulting in the multiplicity of varying definitions of the law. Through an instinctive approach of the phenomena, along with its solution, and further, as a way of illustrating the subject, the general aspect comes within two main points. The first remains a body of rules, abstract in nature, and the second the more vital, is the social machinery for securing order in the community itself.[26] Therefore for a systematic thought, both sides of the theoritical and practical aspect of the law have to be studied, which result in the diversity of answers in the scope of the province of jurisprudence, for it is said that, "All systematic thinking about legal theory is linked at one end with the philosophy and at the other end, with the political theory ..... But all legal theory must contain elements of philosophy ..... -man's reflection on his position in the universe..... and again its colour and specific content from political theory, the idea entertained on the best form of society. For all thinking about the end of law is based on conceptions of man as a thinking individual and as a political theory."[27] To the naturalist and idealist jurists, the ultimate source of law is available in Divine Commands or in Reason, and they regard the identities and similarities in the positive law of all countries, as a proof of the universality of moral and legal norms.[28]

The forces at work in the development of the law being logic and reason, the postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents.[29] The province of law is the setting up of rules for the proper regulation of human conduct amongst the diversity of

26 Paton, 2.

27 Friedmann, Legal Theory, 3 (1953).

28 Schlesinger, Comparative Law, 29; note Pound, Comparative Law in Space and Time 4 Am J. Comp. L. 70 etsp. (1955).

29 Holmes, The Path of the Law 10 H L.R. 465 (1897)

instincts and ambitions, to reconcile the wishes of the individual with the community interest. It curtails the fictitious freedom of individual desires, by subordinating and putting it under descipline of the community action, leaves it upon the universal rational principles.[30] By this subordination of the iudividual, there develops a higher freedom which is based upon the dictates of reason which is the aim of law or the function of legal philosophy.[31] The varied legal systems show many sides of efforts towards the realization of this particular end of law. The varying conditions of different societies with their different stages of developments do not remain exactly similar, but result in the differences in their processes of evolution and maturity of thought. Yet the universality of human reason, along with the similarity of human constitution produces much similarity in all the legal systems. Like Savigny's notion of a national *Volksgeist* that "law like language is peculiar to every nation," the proper subject of general or universal jurisprudence is a description of such subjects and ends of laws as are common to all systems, and of those resemblances between the different systems which remain bottomed in the common nature of man.[31a] The identical needs of every society have been met by different communities in different ways; but in as much as the needs of all societies in general are the same, and the forces which work for their removal are similar in their character, the differences in detail conceal within them a deeper unity.[32] This deeper unity unlike concrete jurisprudence, having a referenc to a particular system of law, shows the conditions and changes of shapes under the light and effects of historical and geographical factors, which resulting in a number of separate legal units differ greatly from each

30 Sen, Hindu Jurisprudence, 1 (1918)

31 Pound, Philosophy of Law, I.

31 a. Schlesinger, 29 quoting Schmitthoff, The Science of Comparative Law 7 Cam. L. J. 94 (1939).

32 Sen, Hindu Jurisprudence. 2.

other in the rules by which they regulate the various legal relations which arise in the daily life of humanity.[33]

THE NATURE AND SCOPE OF THE ISLAMIC JURISPRUDENCE

After tracing out the nature of the term 'General Jurisprudence' and comparative law, it is easy to tread with the same search-light the term 'Islamic Jurisprudence'. The need and reason for attempting to maintain a common core of agreement among the varied legal systems of the modern world and the profits from the judicial and legislative experiences of other nations compel a modern jurist to study from the system of jurisprudence other than his own. The Islamic Jurisprudence which is applied and followed by a great bulk of population of the world, was originated at a time when the western systems of law were not developed as they are in the modern shapes and it will be more than a mere academical interest if its institutions and laws are examined by a major emphasis upon the comparative method of study. In that vital branch of legal theory, the aim and object of legal research and dessertation is the examination and lucid explanation, expositions of the Muslim conceptions of law and its institutions. The subtle expositions and discussions of the Islamic Jurisprudential concepts and sources of the legal theory are examined in abstract terms and in practical applications, as a way in weighing up the comparative values of the Sharia theory suited for modern times. For example, the concepts of "ownership and possession", which are common in all legal systems, when examined in theory and practice in terms of general jurisprudence and comparative law, a discussion is entered into it as a whole, with reference to the general notions of the law. The Hindu legal system enters into it with the Hindu conceptions of legal theories as propounded by the Hindu Shastras and theorists, while the

33 Cf. Cheshire, Private International Law, 3.

Roman, and the Anglo-American jurisprudence weigh the concepts by applying the principles and rules according to their theories and philosophies of the law. To the same effect the Islamic Jurisprudence with its own conceptions defines, classifies and examines the particular concepts.

The reasons of study and dicussions of this Islamic notion of jurisprudence has a two-sided theory. The first, is that the particular system as ordained and sanctioned by God through Quran, explained and modelled by the traditions of the Prophet, and exposited and transmitted by the Muslm jurisprudents and scholars, transformed itself into an elaborate systematic science of law. Secondly, its evaluated comparative nature being an automatic adjustive intellectual science of the rule of human conduct remains of much value for the laws in the modern changing society. For the necessity and want of social life are, as we shall see, the two all important guiding principles recognized by the Islamic Jurisprudence in conformity to which laws should be applied to actual cases, and so long this condition is kept in mind, the courts in administering the Islimic laws are entitled to take into account the circumstances of actual life and the changes in the people's habits and modes of living.[34]

By defining 'law' in terms of purpose, and tracing out the historical evolutions of the law, we find two things at the out-set. The first, is the search of mankind for absolute justice and causes of its failure and the second, is the thought that law is the essential foundation for the life of human being in society as based upon the needs of man as a reasonable being. The Islamic religion is a religion of human nature and all its laws and codes for the regulation of human conduct are in total accord with reason. The modern jurisprudence of interst is nothing, but another side of the theory of natural law as an attempt to examine the conne-

34 Abdur Rahim, 43-44; Ghulam Mohiuddin V. Hafiz Abdul AIR 1947 All. 127.

ction between the law and the needs of man as a reasonable being.[35] The Quran sanctions to the same effect by directing that, "Set thy face steadfast towards the religion as an Hanif, according to the constitution whereon God has constituted men; there is no altering the creation of God, that is the standard religion, though most men do not know". XXX. 29 (Palmer's transl.).

The American Declaration of Independence of 1776 says, "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed .....", and to the same effect remain the Preambles of many countries' constitutions. The Islamic Sharia preaches absolute morality and tolerance by commanding every Muslim to abide by its teachings. The Quran declares that, "Serve God, and associate no creature with Him; and show kindness unto parents, and relatives, orphans, and the poor, and your neighbour when kin to you and also your neighbour who is your stranger. and to your familiar companions, and the traveller and the captives whom your right hand possess."V. Ch. IV. (Wherry's transl.)

Further, the Holy Book sanctions modes of human behaviours for the people in the following words, "Moreover God Commandeth you to restore what ye are trusted with to the owners; and when ye judge between men, that ye judge according to equity: and surely an excellent virtue it is to which God exorteth you; for God both heareth and seeth". V. Ch. IV (Wherry's transl.)

35 Paton, 102; Pound says that, "Interests, that is, the claims or demands or desires for which or about which the law has to make some provision if civilization is to be maintained and furthered, are asserted by individual human beings". Cf. Social control through Law, 68 etsq. (1942).

The function of the Islamic legal philosophy is to control the conscious actions of the people to do or abstain from doing an act. The inner movements are those which are not being controlled by the individual will, as for instance, drinking water is a conscious act, but the passing circulation of blood in the veins and nerves in a human body is an involuntary movement which remains incapable of being controlled. The juristic theory of Islam deals with these conscious acts of the people. It differs from the physical and bodily laws which control in order to regulate the movements of the outside physical world as the circulation of earth around the sun.

After tracing out the main underlying basis of the law, with its relation to the principles of natural justice recognized for the human rights, we find the doctrine of 'natural law' being dominated by the thought that law is an essential foundation for the life of man in society and that it is based on the needs of man as a rational being.[36] The doctrine of natural law was defined and applied by the Western Christian Fathers in terms of Divine origin. St. Thomas defined the term 'law', " as an ordinance of reason for the common good made by him who has the care of the community and promulgated.[37] He advocated that a persons, wisdom and independence of will are the nearest of God in the universe, and "the eteranal law governs the world through the will of God and according to His wisdom". "For humanity this eternal law becomes the natural moral law, the basic rule being: act in conformity with your moral nature."[38] According to the Islamic Jurisprudence 'law' or *Hukum* is that which

36 Paton, 79 citing Del Vecchio Justice, Droit, Etat 134-5.

37 Summa Theologica, Pt. 2. Vol. 8, p. 8 (1927) cited by Friedmann, Legal Theory, 30.

38 Paton, 83; In France 'Ratio Scripta' or "written reason" stands for natural law: Cf. David & Vries, The French Legal System, 14 (1958).

is established by a communication or *Khitab* from God with reference to men's acts, expressive either of demand or indifference on His part, or being merely declaratory.[39] The result of it is that the foremost postulate of the Islamic Jurispudence became the "Iman" or faith, which is the belief in the unity of God and the acknowledgement of His authority over individul action, for the Quran says, "It is not righteousness that ye turn your faces in prayer towards the east and the west, but righteousness is of him who believeth in God, and the last day, and the angels, and the scriptures, and the prophets; who giveth money for God's sake unto his kindred, and unto orphans, and the needy, and the stranger, and those who ask, and for redemption of captives; who is constant at prayer, and giveth alms; and of those who perform their covenants, when they have covenanted, and who behave themselves, patiently in adversity, and hardships, and in time of violence; these are they, who are true, and these are they who fear God". II. Ch. II. (Wherry's transl.). The majority of Muslim jurists hold that 'faith' being founded upon reason, the acknowledgement of God automatically and inevitably brought home to man, and as a result of which with its ultimate basis thereof, for the justification 'law' should be sought in human reason.[40] To some jurists, the origin of law is due to the primordial covenant between man and God at the time of creation of the universe. God has the primary authority to enact laws and He is the supreme Legislator and Sovereign in the legal system of Islam. The Quran declares, "And when thy

39 Abdur Rahim, 50; Aghnides, Mohd. Theories of Finance, 23; note the view of Prof. Khadduri that, "Just as natural law exists in nature, to be discovered by reason, so the Sharia, as an Islamic natural law, was revealed to, or "discovered" by, the Prophet Muhammad": Law In the Middle East, 352.

40 Taudih, 48; For a critical analysis see Abdur Rahim in 5 Cal. L, J. 21n-25n, 29n-32n, 37n-40n, 41n,- 44n, 49n-56n (1907)

Lord took from the children of Adam out of their loins their seed, and made them bear witness against themselves, 'Am I not your Lord'? They said 'yea! we do bear witness'—lest ye should say on the day of resurrection, 'verily, for this we did not care'...."VII. 172 (Palmers transl.)

God promulgated His laws for this world on different occasions, countries, and stages of civilizations through His messengers or prophets, as the Quran explains, "And remember when God accepted the covenant of the prophets, saying, this verily is the scripture and wisdom which I have given you : hereafter shall an apostle come unto you, confirming the truth of that scripture which is with you; ye shall surely believe in him, and ye shall assist him. God said, Are ye firmly resolved, and do ye accept any covenant on this condition? They answered, we firmly resolved God said, Be ye therefore witness; and I also bear witness with you." III. Ch, III (Wherry's transl.). Thus the chain of the succession of revelations was due greatly to the necessities created by the changes in the needs and affairs of human beings. As the new prophets came, a necessity was created and it was felt to repeal, amend or accept in part, the previous revealed laws. As a way of illustration it is said that, "In the days of Adam and his immediate progeny, the closest relationship by blood was no bar to inter-marrige, but when the female population sufficiently increased, marriage was prohibited within a certain degree of relationship."[41]

The main principle of law in Islam is surrender and submission to one sovereign commanding authority which is akin to the imperative theory of law of Austin. It was inevitably kept in view that the religion of Islam was the last religion and Prophet Muhammad was the last in the line of the prophets. The Quran explains lucidly that "Muhammad is not the father of any man among you; but the Apostle of God and the seal of the prophets: and God knoweth all

41 Abdur Rahim, 53

things". XXII. Ch. XXXII (Wherry's transl.). The Prophet of Islam was foretold by Moses and Jesus. The Quran says, "Say, 'Have ye considered, if it is from God and ye have disbelieved therein, and a witness from the childran of Israel testifies to the conformity of it, and he believes while ye are too big with pride? Verily God guides not the unjust people". XLVI. 9 (Palmer's transl.).[42] Similarly another verse of the Quran says that, "And when Jesus the son of Mary said, 'O children of Israel! verily, I am the apostle of God to you, verifying the law that was before me and giving you glad tidings of an apostle who shall come after me, whose name shall be Ahmed!.....but when he did come to them with manifest signs, they said, "This is manifest sorcery !" LXI. 6. (Palmer's transl.). It is contended by the Muslim doctors that the word 'comforter' in the present English version of the Bible in Gospel of John XIV. 16, XV. 26, and XV. 7, is for the Greek word "Paracletos" which is a prophecy of the Prophet of Islam.[43] The word Muhammad also bore the name of Ahmad and both names have been derived from the same root and have the same importance.[44] The Persian paraphrast, to support what is in the Quran alleged, quotes the words of Christ, "I go to my father, and the Praclete shall come", and it is contended by the Muslim jurists that by the Paraclete or Periclyte or Illustrious, the Prophet Muhammad is intended and that the change had been made by corruptions in reading.[45]

It is believed by Muslims that God sent prophets

42 Ref. also be made to Deut. XVIII. 18-19.

43 See A. Yusuf Ali, The Holy Quran, Text, Transl. and Commentary I. 144, II. 1540; Gibb, Mohammedanism, 53.

44 Note : Palmer's transl. of the Koran, 482 note 3, (The world's classics No. 328 of 1954) where it is stated that, "The allusion is to the promise of the Paraclete in John XVI. 7, the Muslims declaring that the word.....has been substituted in the Greek for .....whicn would mean the same as Ahmed".

45 See Sale's trans. of the Koran 410.

originating from Adam and ending upon Muhammad. Many of the prophets have been specifically mentioned in the Quran and others have not been so mentioned.[46] The laws given to Moses were confirmed by Jesus and the Quran also confirmed what was unrepealed and set-aside the matters commanded to be repealed. The Quran narrates the situation in the following words, "We also caused Jesus the son of Mary to follow the footsteps of the prophets, confirming the law which was sent down before him; and we gave him the gospel, containing direction and light; confirming also the law which was given before it, and a direction and admonition unto those who fear God: that they who have received the gospel might judge according to what God hath revealed therein: and who judgeth not according to what God hath revealed, they are transgressors. We have also sent down unto thee the book of the Koran with the truth, confirming that scripture which was revealed before it; and preserving the same from corruption. Judge therefore between them according to that which God hath revealed; and follow not their desires, by serving from truth which had come unto thee. Unto every of you have we given a law, and an open path; and if God had pleased, He had surely made you one people, but He hath thought fit to give you different laws, that He might try you in that which He hath given you respectively. Therefore strive to excel each other in good works: unto God shall ye all return, and then will He declare unto you that concerning which ye have disagreed. Wherefore do thou, O Prophet, judge between them according to that which God hath revealed and follow not their desires; but beware of them, lest they cause thee to err from part of those precepts

46 See Bahari-Shariat I. 15 for details; compare for interesting discussions about prophetships of Lord Krishna, Rama, Zoroaster, Mirza Ghulam Ahmad Qadian, in Narantakath Arullah V. Parakkal Mammu and other 45 Mad. 986: 71 I. C. 65; see also Khalil Ahmad V. Israfil 37. I. C. 302: AIR 1916 Pat. 87.

which God hath sent down unto thee; and if they turn back, know that God is pleased to punish them for some of their crimes; for a great number of men are transgressors. Do they therefore desire the judgement of the time of ignorance? but who is better than God, to judge between people who reason aright". V. 46 to 50 (Sale's transl.).[47]

The Prophet of Islam used to recognize the validity of the old laws, expressly or impliedly, but with the tampering with the laws legislated by God, the pre-Islamic laws as advocated by Muslims, became corrupted and for these reasons amongst others that the Prophet, was given the task of reviving the eternal principles of laws as sanctioned by the almighty--God, and that was through Islam, the last religion. Its necessary result was the acceptance of the belief of universal truth in the mission of Muhammad (Peace be upon him), as another essential element of faith of the religion of Islam.

It is a tendency in the modern times, to attribute the legislations of the Quran to the Prophet himself, instead of accepting him as the medium of Divine legislations, and even some western writers with the intention to discredit Islam in the eyes of the west, have translated the Quran to 'show up' instead of appreciating its beauties.[48] It is submitted that a grave danger lies in accepting such views, as the very basis of the Islamic system is the Quran, which is a revealed book of that Divine Authority and Supreme Power

47 See Sale, the Koran, (transl.), 79-80; note also Ameer Ali's words that the name of Christ originated the Christian religion, which is a religion ordained by God, the religion of Islam having a distinctive appellation as such was originated by the Prophet Muhammad, who was the Apostle of God. It is the primary and secondary meaning as devoted by the term 'Islam itself, that it is the duty of a man to be tranquil, to remain at perfect peace after surrendering self to the maker of peace i. e. to God. In other words, it is the striving of one-self after righteousness: Cf. The Spirit of Islam, 137-38.

48 See A. Yusuf Ali's remarks in the Holy Quran, Texts, Transl. and Commentaries, I. p. XIV-XV.

which rules the whole universe. The Islamic system is a scientific system as a whole having the qualities with capacities of adjustments to the changing human society and the needs of life. To the Westerner, law is a system of command enforced by the sanction of the state. This concept is wholly alien to the Islamic theory of law, for the Islamic law performed not only intellectual and scholastic function, its effects were more effective in moulding the social order and the community life of the Muslim people by exerting pressure upon their social and individual activities as a whole. [49] The Muslim scholars thought of law not as an independent or empirical study but a practical and concrete aspect of religious with social doctrines, and similar to other semitic religions, it was considered as an immutable divine inspiration. [50] The law in Islam prescribes everything that a man shall do to God, to his neighbour, and to himself, for it takes all duty for its portion and defines all action in terms of duty. [51] The Quran when applied to the judicial matters, is entitled by way of distinction, *al-sharra*, or the law, in the same manner as the Pentateuch is distinguished by the Jews and its original is believed to have existed from eternity inscribed on the tablet of the divine decrees, which stands close by the throne of God, and contains the predestined fate of Man and things and a copy of this tablet was taken by angel Gabriel and being conveyed to, was revealed to the Prophet in portions at different times. [52] Upon a

49 See Prof. (Vesey-) Fitzgerald in Law In the Middle East. 85; Gibb. Mohammedanism, 17.

50 Gibb, 73.

51 Macdonald, Muslim Theology, Jurisprudence And Constitutional Theory, 66-67; Prof. Anderson in Islamic Law in the Modern World, 3, says that, 'In every action of a human being there is a moral quality which is possessed of, suitability on the one side and unsuitability on the other, and it is submitted that a Muslim has to seek for guidance to the creator of the universe, for such moral and religious acts: Cf. Macdonald, 73.

52 Ham. Hedaya, Prelim. Discourse.

comparision of the Islamic legal system with other modern systems, it has been observed that, "the legal system under review differs, it is believed, from other modern systems, in that it purports to have for its sole source the Divine Will conmmunicated, in its final form, through a single human channel. The Mosaic Law comes nearest to it in this respect; but whereas the Jew speaks of "the law and the prophets", orthodox Moslems acknowledge no divine inspiration subsequent to Mohomet; while holding all previous revelations, however genuine and important in their day, to have been absolutely merged in his revelation."[53]

The Hindu legal syrtem as derived from the Shastras, purports to be explained by the expansions and interpretations of the Vedas. Its theory and popular belief view the Vedas as having the divine origin. [54] The authority of the Vedic texts containing precepts for the regulation of human conduct is founded upon direct revelation; the wisdom of these precepts with their authoritative character are the fundamental assumptions of the Hindu Law. [55] It is to be remembered that the Hindu and Islamic laws are so intimately connected with religion that they cannot readily be disserved from the latter. [56] It is said that Islam has a doctrine of certitude in the matter of Good and Evil and one cannot understand what are these, without the guidance of an inspired Prophet. [57] Islam has four principal roots, which are the Quran (the word of God), the Sunna (the practice of the Prophet), Ijma (consensus) and Qiyas (analogy), and it is the duty of every Muslim to take help and inspiration in order to arrive at legal decisions. These are the principles

53 Wilson, Anglo-Mohd. Law, 6.

54 Ganpathi Iyer, Hindu Law, I. 22; The Hindu Law has been greatly amended on the patterns of western Domestic Relations by legislations, see Mulla, Hindu Law (1959).

55 Sen, Hindu Jurisprudence, 10; Kane, History of Dharmashastra.

56 See Mahmood, J. in Gobind Dayal V. Inayatullah 7 All. 775, 781 (1885).

57 Fyzee; Mohd. Law, 14 citing Ostrorog's The Angora Reforms, 16.

which constitute the basis of the Shariat (Canon Law) as understood by the Muslim doctors.

Modern international law is based upon the consent of the sovereign countries of the world, being composed of a family of nations in which each state enjoys full sovereign rights with the equality of status.[58] The sources of the law of nations are agreement (treaties), custom, general principles of law recognized by civilized nations and others.[59] The Islamic Sharia may be interpreted in the light of such sources of the law of nations for "the Quran represents the authoritative source of law; the Sunna is equivalent to custom; rules expressed in treaties with non-Muslims fall in the category of agreement; and the opinions of the caliphs and jurists, based on legal deduction and analogy, may be regarded as reason".[60] The modern law of nations lays much stress upon the proper controls of laws of war, international treaties, and conventions.[61] The Islamic law similarly provides and makes proper safeguards to avoid unnecessary damage in life and property.[62] The head

58 See Oppenheim, Internatlonal Law (1955); Kelsen, General Theory of Law and State (1945); Bishop, Cases and Materials on International Law (1953); Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations, 51, Am. J. Int. L. 734 (1957 .

59 Ref U. N. Charter (1945); A. 38 of the Statute of International Court of Justice.

60 Prof. Khadduri in Law In the Middle East. 352-353; Law of War and Peace In Islam (1941); Hamidullah, Muslim conduct of state (1954); see also Nussbaum, A Concise Hist. of the I aw of Nations p. 51 et sq (1958); Majid, the Moslem International Law, 28 L.Q R. 89-93 (1912).

61 See for details: History of the United Nations War Crimes Commission and the)evelopment of the Laws of war (H. M. S. O. London); for a comparative study see Rheinstein, Comparative Military Justice, 15 Fed. B. J. 276-85 (1955).

62 See Prof. Khadduri in Law In the Middle East. 355 etsq. citing Tabari, Tarikh IV. 1850 (Series I. 1890); Shaybani, al-siyar al-kabir III. 212; See also Quran. XLVII. 4, LC 13, VIII 41.

of the Islamic country is authorized to enter into treaties with other countries. The Sharia sanctions him to abide by his commission, and he can withdraw from the treaty only after giving sufficient notice of his intention to the other party, unless the other party begins hostilities in violation of the treaty.[63] The citizens of other states who are non-Muslims are protected by the Muslim state and individuals.[64] The Sharia also provided methods to settle disputes through arbitration and it may be compared to the modern international practices which resort to the method in cases of international disputes among the countries.[65]

63 Abdur Rahim, 394; see Quran XVI. 91, IX. 4, III. 75-76.

64 Ibid. 395 citing Hedaya V. 210-13; see also Malik, al-Muwatta I. 249 cited by Prof. Khadduri, 361.

65 See Quran IV. 59; note Prof. Khadduri. 367 etsq. for details.

II

The Science of Law

§ I Preliminary Observation

The Prophet of Islam preached the religion of Islam not only for a municipal government centered in and around Arabia, but propounded the principle of the municipal law as an indispensable element of a comprehensive and elaborate scheme of universal religion. This comprehensive system, with its rules of human life developed into a vast progressive system of jurisprudence. The task of the general jurisprudence and comparative law is to study the nature of law, its development and relationship to society, as in each society there is an interaction between the abstract rules and life of the people; [1] and similar is the nature of comparative law which is a method and way of looking at legal problems. [2] To achieve the objective of an ordered community, each legal system through its stages of progress, develops ways and modes of its technical concepts. The life of the law has not been logic, but it has been through experience for the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices of judges has to determine the rules for governing men, and since the law embodies the story of a nation's development, hence we to know what it has been and what it has move to become.[3] So one has to consult history and the existing legal developing theories with the stages of development. As the substance of law corresponds to what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out the desired

1 Paton, 7.

2 Schlesinger, Comparative Law, 1.

3 Holmes, The Common Law, I. 1 etsq.

results, depend very much upon its past, [4] as it has been justly said that today, we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow. [5]

The legal development of the general notions of the science of law, with some variations can be applicable to the Islamic system. The Quran and the Sunna or model behaviours of the Prophet have been exposited and explained for the daily life in the Islamic society. Law, in any sense in which a Western scholar would recognize is a part of the whole Islamic system with inextricably combined elements; for *Sharia,* (the Islamic term of 'law') is the "whole Duty of Man." [6] It professedly centres more round the personality and the saying or practices of the Prophet and even the Canon Law of the Trinitarian Chruch of Christians round the personality of Christ could not compare it. It digs up the smallest details of the daily lives of men, women, and children, private and public, religious and secular. [7]

The religion of Islam is a religion of human nature, which has a particular appeal to the modern mind. It has existed since the beginning of the Universe and will so exist till the day of Resurrection. As God sent his Prophets (see supra) from time to time in order to purify the corruptions in the world communities, so was the mission of Muhammad (Peace be upon him), the last in the line of the prophets, and the religion he preached was not a new religion, but a revival of the original purity subject to the modern changes of the world. ''However, that may be, Islam, with its glorious history, its magnificient literature, its simple, stoical tenets, will certainly remain,

4 Ibid.

5 Frankfurter, The Commerce Clause, 2-3 citing Holmes and Maitland.

6 Prof. Fitzgerald in Law In the Middle East, 85.

7 Wilson, 7; Abdur Rahim in 5 Cal. L. J. 21n-25n (1907) for views of Imam AbuHanifa and Sadawsh Shariat on 'science of Law' in Islam.

for many millions, at the very least an ideal, a moral doctrine, teaching men to be clean, abstemious, brave and charitable, proclaiming as fundamental commandment the noble Quranic Verse : Verily God commands you to be just and kind:— a religion, nothing more, but such a religion that even those who do not profess it, but have studied it with a certain care, render it the tribute of a deep sympathy and a profound respect.". [8] It was the Islamic religion, with its dynamic and beneficial progressive out-look upon the lots of the people of the pre-Islamic Arabia to mould and revolutionize their archaic institutions, to reform the daily behaviours of the community and to bring them into the forefronts of the civilized nations of the time. To the pre-Islamic Arabs any conception of law was totally unknow, their societies being devoid of any constitution, being based utterly upon an idividualistic state of nature, where the single man was a sovereign and no writ could lie against him.[9] For such people, God sent His Prophet Muhammad to reform them and bring into par with the changing society. God gave the Prophet, His Holy Book, the Quran, and commanded a uniform code of universal religion and law through it. As all the universal system is created by God, all men are compelled to act in accordance to the principles ordained by Him.

The Quran, which is the Book of God, converted the heathen Arabs to the idea that law is the direct command of God, and as a whole has to be obeyed. The most clear source of informatirn concerning the laws of God to which enquiries could be directed were the model behaviours of Prophet himself and his companions in an approved form. It has been well illustrated that, "Just as the Common Law is to be culled from the decisions of the judges recorded in

8 Ostrorog, The Angora Reform, 89.

9 Macdonald, Muslim Theology, Jurisprudence and Constitutional Theory, 68.

the Year Books and law reports, so the Sunna, the common law of Islam, is to be culled from the traditions which are for this purpose the Law Reports of early Islam". [10] As it was a reasonable deduction from the Quranic teaching duly consecrated by a hadith, that God would not allow His people to commit error, so the doctrine of consensus or Ijma was developed. By a process of deduction by which the law of the Quranic text was applied to cases which though not covered by the language, but being governed by the reason of the text was called Qiyas or Analogy. The Islamic Jurisprudence was hence developed by a process of evolution, and the developing process is still continuing for in the twentieth century of the space era, the legal theory is taking a turn in order to bring the life of the Muslim community in par with the changed notions. The Muslim countries, as for example, Egypt, Tunisia, and others have introduced changes in order to bring the law and the science of jurisprudence as a way to fulfil the inherent natural demands of the religion to the modern mind. The best illustration of it is available in the following tradition, which, though centuries old, remains ever-fresh as a proof of the high practical value of the Islamic system. It is reported that the Prophet sent one of his companions named Muadh, who was a judge to take charge of legal affairs in al-Yaman and asked him:

"According to what shalt thou base your legal decisions".

He replied: "On the Quran".

"But if that contains nothing to the purpose"!

"Then upon your usage".

"But if that also fails you"?

"Then I will follow my own opinion (reason)";

10 Fitzgerald, 90; For scientific study and characteristics see Rattigan, the Scientific study of the Muhd. Law, 17 L. Q. R. 402-414 (1902); Yankwich, Some characteristics of Mohd. Law, 20 Southern Calif. L. R. 340-351 (1947); Safwat, Theory of Mohd. Law, 2 Jl. of Comp. L. 3rd. Ser. 310-316 (1920).

And thereupon the Prophet said:

'Praise be to God who has favoured the messenger of His Messenger with what His ,Messenger is willing to approve". [11]

The traditions give a clear proof and method of interpretation, as they show the extent of the permissibility of independent judgement in law, for the Qurrn has to be interpretted, the actions and the sayings of the Prophet considered, and judgement given in an especial way in cases where the Quran and the Sunna or traditions of the Prophet are silent upon a point of importance. [12] The legal theory of Islam developed by ways of choosing the legal practices of the time through endorsements, amendments and rejections of the materials as suited to different circumstances, conditions and places. The jurists who evolved and interpreted the rules of jurisprudence differed among each other in minor details, but have fundamental and basic similarities. It originated the different schools of the Islamic Jurisprudence to become vital upto the modern times in every sphere of the Muslim civilization and the ways of life, and for our present purposes, we have to study and analyse the legal history of Islam from its origins, with the stages of developments to the modern adaptations.

§ 2 The Formations and Transmissions of the Legal Theory and Development of Schools.

Though there is a consensus of opinion among the

11 Prof. Macdonald, 86; Ostrogrog, 16; Wensinck, Early Muhammadan, Traditions, 156; compare Article 1 of the Swiss Civil Code that, "A law governs all matters which come within the letter or spirit of any of its provisions — where no legal provision is applicable, the judge decides according to customary law and, in the absence of a custom, according to the rules which he would establish if he had to act as legislator. — He is guided by those solutions approved by doctrine and case law".—cited by David And Vries, The French Legal System, 94-95.

12 Fyzee, 16 citing Morley, Admn. of Justice In British India, 257.

scholars about the stages of the development of the Islamic legal history after the promulgation of Islam, yet some recent researches hold that the stages and classifications are a bit different from the classical and accepted views. The matter touches the crux of difficulty with an interest and zeal for the anxious scholar and student of the law in order to examine the researches as a way in finding their acceptibility and tenability, which as a whole re-evaluation remain more appealing to the modern mind, though they lack in a comparative re-evaluation in the branches of the jurisprudence itself for the sake of clarity in relation to modern circumstances and necessities.

The accepted view divided the legal history into four different periods and the recent researches show it as being classified into six periods. [13] The new theory starts the first period of the Islamic legal history from the life of the Prophet himself, from the first Quranic revelation on the seventeenth night of the month of Ramadhan, the second period began from the eleventh and remaining in operation ended upto fortieth year of the Hijra era during the times of the companions of the Prophet. The third period was during the times of companions and their successors, it began with the foundation of the Ummayid dynasty in the fortieth Hijra year and remained in existence with the strength and vigor of the Arabic sovereignty of state and ended with the beginning of the second century of Hijra with the weakening of the governmental power. The fourth period started with the beginning of the second century and lasted to the middle of the fourth century Hijra and during this period the great Imams of the schools of law gave contributions in relations to the science of jurisprudence and the traditions of the Prophet. The fifth period started with the beginning

13 See Tarekhul-tashrihi-Islam by Mohd.-al-Khudari (Urdu Transl. Tarikhi-Fiqhi-Islami by Abdus Salam Nadvi) 2nd Ed. 1961

of the fourth century, lasted to the downfall of the Abysside dynasty and during this period the important schools developed their characteristics, principles and natures of the Sharia of Islam, and the sixth period which started with the victory of Baghdad by Halague Khan remains in operation to the present day and so this period is a mere period of Taqlid. [14]

It is submitted that the new classification is full of scholarly learning and discusses the history of jurisprudence of Islam in a comprehensive, distinctive way, with critical reasonings and factors of legal with religious thoughts showing the building shapes of the legal and religious philosophy fortified by proper references of the authorities. But it is regrettable that it lacks to give a comparative treatment of every branch of the science of jurisprudence, and had it been attempted, it might have proved beneficial in knowing the jurisprudence of either of Sharia schools in conformity with the present thoughts of the modern circumstances and needs of life. [15] For these amongst other reasons of basic and fundamental similarities of the new classification with the generally accepted classification, it seems better to take the course adopted by the latter. It classifies the legal history as said above into four periods. The first period is called the period of the Holy Prophet or the legislative period the second is the time of the Companions of the Prophet and their Successors, the third remains the period of the theoretical and scientific study of the law, and the fourth is the period of commentators. [16]

THE PERIOD OF THE HOLY PROPHET OR THE LEGISLATIVE PERIOD

The first period commences with the retirement of

14 See Abdus Salam Nadvi, Tarikhi-Fiqhi-Islami, 3-153, 154-192, 193-242, 243-415, 416-466, 467-480 (1961).

15 Ibid. 3 (Preface).

16 Abdur Rahim, 16; Muqadma Ibn-Khaldun; Kashaful-Zanun; Prof.

the Prophet to Medina in 622 A. D., which marks the commencement of the Islamic era and ends with his death. The laws were legislated by God through the medium of the Prophet, similar to cases of Moses, David and Jesus. These laws were ordained and promulgated through the Holy Book of God- the Quran, and were given to mankind on different times in the last twenty-three years of the life of the Prophet. They related to various current problems and controversies of human life. Unlike Christianity in which the rules of civil, criminal and temporal relationships were generally excluded, the Quranic laws contain the precepts and texts for the regulation of human relations as required in the daily individual, family and social lives. Here it may be said, that the Jewish religion when seen as a way of comparative method of study, bears similarity with the Islamic system, for the Rabbinical law was a system of law akin at points to Arabian customs, founded on the same monotheistic principle and imbued with the same spirit closer to Islam. [17] We find in the original Jewish system the institutions of polygamy, and divorce similar to the Sharia provision. [18] But as the previous revelations had been corrupted and unreliable, God repealed and modified them with the promulgation of Islam. Every word of the Quran is accepted as the very words of God by the angel Gabriel, the Holy spirit, to the Prophet. It is wrong totally to say that the Prophet himself lagislated, for it has been said that prophets were not theologians, nor they lawyers though they provided messages both for theologians

Hafeezur Rahman, 7-46 (1952); Abdur Rahim (Reprinted) in 7 Col. L. R. 101, 255 (1907).

17 Prof. Fitzgerald, 89; see also his ref. to Margoliouth, "Omar's Instructions to the Kadi" in Jl. of the Royal Asiatic Socity, 307-26 (Ap. 1910).

18 See R. Roberts, The Social Law of Koran (1925) and the authorities cited therein.

and lawyers. [19]

The Muslim doctors have always agreed that it is wrong to make a difference between the Quran and the Prophet. The Quran is the word of God but the sayings and the model behaviours of the Prophet were under his control too, and so were in accordance with the Quran. A man can challenge the authenticity of a tradition or sunna, but when the law laid by the Prophet either by his words of mouth or through model behaviours has once been established, nobody can challenge its authority,

THE PERIOD OF THE COMPANIONS OF THE PROPHET AND THEIR SUCCESSORS

The second period starts from the date of death of the Prophet (632 A. D.) and survived upto the foundations of the different schools of jurisprudence. After his death in June, the task of religion and sovereign administration of the state was left upon the companions who were called *Asbah* and tbeir successors called *Tabiun*. [20] The Prophet (Be peace upon him) was last in the line of prophets, the fear of absence of any further revelation gained momentum making heavy the tasks of the companions and the successors. For this, they supplemented the explicit injunctions of the Quran with the facts from the life of the Prophet and memories of his sayings which helped materially, to throw light upon the expanding problems of the Islamic commonwealth and upon the ever widening scope of the Muslim individual life and their public and private affairs. [21]

The period has importance for two facts. The first is the close adherence to the ancient practice under the fiction of the adherences to the traditions or the Sunna of the Prophet, and secondly, in the collections, and editing of the

19 Prof. Fitzgerald (citing Goldziher), 87.
20 Abdur Rahim 16; Wilson, 7.
21 Wilson, 23; Fyxee, Mohd Law, 23

texts of the Quran. [22] Upon the Prophet's death, a problem to fill up the gap of his successors to head the Islamic Commonwealth arose. A conflict arose which still remains the cause of the difference between the Sunni and the Shia schools and sects. Yet the successor was selected, and the first caliphate or the Enlightened Caliphs of it were called *Al-Khulfai-Rashedun*—being possessed of high beneficial and venerable contributions for Islam. They put down in practical shape, by specifying the laws, the principles of its rules as learned from the Prophet. Their interpretation might not have the force of legislation in the strict sense, but for all practical purposes it assumed that force, for they had the benefit of learning the Quranic laws from the Prophet himself and from his friends. They fostered and encouraged by the state authority the studies of traditions and the law (fiqh). [23]

The great achievement of Islam lies in its simplicity, its adaptability, its high yet perfectly attainable ethical standards. For the value of the collection of the Quran, the administration of justice, the study of law and traditions of the Prophet or the *Ahadith*, the study of law as a science along with other researches, the period under review is called the Golden Age of Islam. The reason of it, was the high piety, knowledge and wisdom of the scholars of the time as remarks the historian al-Fakri that "know further that they were not abstinent in respect to their food raiment from poverty or inability to procure the most sumptuous apparel or the sweetest meats, but they used to do this in order to put themselves on an equality with poorest of their subjects and to wean the flesh from its lusts. and to descipline it till it should accustom itself to its highest potentialities; else was each one of them endowed with ample wealth, and palm-groves, and gardens and other

22 Browne, 188.
23 Macdonald, 87.

like possessions. But most of their expenditure was in charitable uses and offerings; the commander of the Faithfull 'Ali' (on whom be peace) had from his properties an abundant revenue, all of which he spent on the poor and the needy, while he and his family contended themselves with coarse cotton garments and a loaf of bread .. ... As for their victories and their battles, verily their cavalry reached Africa and the uttermost parts of Khurasan and crossed the Oxus".[24] This patriarchal period of Islam ended in the fortieth year of the Hijra era with the death of Ali as prophesied by the Prophet that "For thirty years my people will tread in my path (Sunna); then will come kings and princes," and so the prophecy became true with the succession of Muawiya as the first head of the Umyyad dynasty, and the centre of the state was shifted from Madina to Damascus [25]

THE PERIOD OF THEORETICAL AND SCIENTIFIC STUDY OF THE LAW AND THE ESTABLISHMENT OF SCHOOLS

The third period commenced about the beginning of the second century of the Muslim Hijra and practically ended with the third century. It was marked by a theoretical and scientific study of the law and religion, along with the establishment of the four Sunni schools of jurisprudence.[26]

The beginning of the second century A.H. marked the starting point of the Islamic Jurisprudence. The essential features of the old Islamic legal theory, as for example, the idea of the 'living tradition', a body of common doctrine expressing the earliest effort to systematize, and all other features are ascribed to the beginning of the second century.[27] The first four caliphs in the second period

24 Browne, 189.

25 Macdonald, 88

26 Abdur Rahim, 17; See also Pound, Jurisprudence. I. 32, III 418, 440, 445 (1959) for the beginning of scientific treatment of Mohd Law.

27 Prof. Schacht, Origins of Mohd. Jurisprudence, 190.

of the legal history, in their functions as the supreme rulers and administators acted much as law-givers during the whole of the first century, and some of the fundamental features of the Islamic Jurisprudence were created. yet the jurisprudence as a science was shaped by the later part of the Umyyad dynasty.[28] The main object of the administrative regulations of the caliphs of the second period was to provide for the need of organization of the newly conquered territories for the benefit of the public.[29] The Umyyad dynasty was responsible for the development of many important features of the Islamic culture with major emphasis upon the political administration by organization, centralization and increasing the bureaucracy.[30] They appointed Islamic judges or Qadis, as the arbitration procedure of the pre-Islamic Arabia and of the earlier period of the legal history was inadequate, and a basic foundation was laid for the Islamic Law. They impregnated the sphere of law with religious and ethical ideas, subjected the religion to Islamic norms and incorporated into it the duties compulsory for every Muslim. Its ultimate result was that the popular and administrative practices of the late Umyyad time was transformed into Islamic law.[31] Further, a group of pious specialists in religious law such as Ibrahim Nakhai of Kufa (d.A.H. 95 or 96), Ibn Masud, Auzai (d.A.H. 157) of Syria, Ibn Ali Lyla (d.A.H. 148), and others, who were private persons became animated by their personal interest upon matters of right behaviours according to Islam and developed the ancient schools of law, with its centre at Iraq.[32]

After the overthrow of the Umyyad dynasty by the Abbasides in A.H. 132 (A.D. 750), the law of Islam by

28 Ibid, 191.

29 Prof, Schacht in Law In the Middle East, 33.

30 Ibid, 37.

31 Ibid.

32 Ibid. 40.

like possessions. But most of their expenditure was in charitable uses and offerings; the commander of the Faithfull 'Ali' (on whom be peace) had from his properties an abundant revenue, all of which he spent on the poor and the needy, while he and his family contended themselves with coarse cotton garments and a loaf of bread .. ... As for their victories and their battles, verily their cavalry reached Africa and the uttermost parts of Khurasan and crossed the Oxus".[24] This patriarchal period of Islam ended in the fortieth year of the Hijra era with the death of Ali as prophesied by the Prophet that "For thirty years my people will tread in my path (Sunna); then will come kings and princes," and so the prophecy became true with the succession of Muawiya as the first head of the Umyyad dynasty, and the centre of the state was shifted from Madina to Damascus [25]

THE PERIOD OF THEORETICAL AND SCIENTIFIC STUDY OF THE LAW AND THE ESTABLISHMENT OF SCHOOLS

The third period commenced about the beginning of the second century of the Muslim Hijra and practically ended with the third century. It was marked by a theoretical and scientific study of the law and religion, along with the establishment of the four Sunni schools of jurisprudence.[26]

The beginning of the second century A.H. marked the starting point of the Islamic Jurisprudence. The essential features of the old Islamic legal theory, as for example, the idea of the 'living tradition', a body of common doctrine expressing the earliest effort to systematize, and all other features are ascribed to the beginning of the second century.[27] The first four caliphs in the second period

24 Browne, 189.

25 Macdonald, 88

26 Abdur Rahim, 17; See also Pound, Jurisprudence. I. 32, III 418, 440, 445 (1959) for the beginning of scientific treatment of Mohd Law.

27 Prof. Schacht, Origins of Mohd. Jurisprudence, 190.

of the legal history, in their functions as the supreme rulers and administators acted much as law-givers during the whole of the first century, and some of the fundamental features of the Islamic Jurisprudence were created, yet the jurisprudence as a science was shaped by the later part of the Umyyad dynasty.[28] The main object of the administrative regulations of the caliphs of the second period was to provide for the need of organization of the newly conquered territories for the benefit of the public.[29] The Umyyad dynasty was responsible for the development of many important features of the Islamic culture with major emphasis upon the political administration by organization, centralization and increasing the bureaucracy.[30] They appointed Islamic judges or Qadis, as the arbitration procedure of the pre-Islamic Arabia and of the earlier period of the legal history was inadequate, and a basic foundation was laid for the Islamic Law. They impregnated the sphere of law with religious and ethical ideas, subjected the religion to Islamic norms and incorporated into it the duties compulsory for every Muslim. Its ultimate result was that the popular and administrative practices of the late Umyyad time was transformed into Islamic law.[31] Further, a group of pious specialists in religious law such as Ibrahim Nakhai of Kufa (d.A.H. 95 or 96), Ibn Masud, Auzai (d.A.H. 157) of Syria, Ibn Ali Lyla (d.A.H. 148), and others, who were private persons became animated by their personal interest upon matters of right behaviours according to Islam and developed the ancient schools of law, with its centre at Iraq.[32]

After the overthrow of the Umyyad dynasty by the Abbasides in A.H. 132 (A.D. 750), the law of Islam by

28 Ibid, 191.

29 Prof, Schacht in Law In the Middle East, 33.

30 Ibid, 37.

31 Ibid.

32 Ibid. 40.

acquiring its important features was established as a legal system. The early Abbasid caliphs achieved the permanent connection of the office of the judge with the sacred law or the Sharia of Islam, and made them to become bound by it.[33]

There were many other 'personal' schools of law with many scholars in the early periods of Islam, but since about 1300 A.D. only four schools survived.[34] They were the Hanafi school founded by Imam Abu Hanifa, the Maliki school of Imam Malik, the Shafii school of Imam Shafii and the Hanbali school of Imam Hanbal, to be followed till the present day of the Islamic world.

The traditions of the Prophet were collected, sifted and edited by eminent holy divines, and the various authoritiative treatises on traditions such as Sahih Bukhari, Sahih Muslim and others were written. The principal expositions of the principles of law, rules of law, as previously laid were interpreted and applied in the daily life of the Muslim Community. The great Imams, though differed from each other on minor points possessed fundamental basic similarity on points of interpretations of the Quranic texts, traditions and other sources or roots of the Islamic Sharia. The Shia Imams differed mainly due to political causes, yet it is true that the Imams were the builders of the Islamic Jurisprudence and philosophy of the law. It would be better to give a brief and lucid summary of each of the Imams, and their schools with specific discussion of the Sunni school at the present moment and of the Shia schools in a separate section.

THE SUNNI SCHOOL

The Sunni school is divided into four divisions to be headed by its own founder.

33 Ibid. 57-58; Prof. Hafeezur Rahman, 38.
34 Ibid. 68.

THE HANAFI SCHOOL

It was established by Imam Abu Hanifa (699-767 A.D.), who was called the Imam Aazam or the teacher of *par excellence*. Although the early Abbasid Caliphate favoured the school, yet it was in opposition to their power. The main features of this school was that it placed less reliance on the mass oral traditions. It developed the exegesis of the Quran by a subtle method of reasoning and analogy called Qiyas and defined the principle that the universal concurrence of the church of Islam as represented by the doctors was itself an evidence of God's will and this was called *Ijma* or consensus of scholars. Thus the Islamic law was of four sources *viz*; the Quran, the traditions, Ijma and Qiyas.[35] The teachings of the great Imam hence led him to be called "the upholder of private judgment", and he assigned a distinctive name to the principle by which the theory of law is modified in its application to actual facts in the Sharia by calling it 'Istihsan' resembling the doctrine of equity of the English law.[36] He also recognized the authority of local customs and usages (Urf) for guidance in the application of the law for many decisions of law were based on them, so much so that it has been taken as a principle of the law.[37] Thus to him the Quran and the traditions of the Prophet were the primary sources, then comes Ijma, but analogy and local customs as mere secondary sources of the law.

He instituted a Committee of Forty Men out of his important desciples to discuss any theoretical and practical matter upon debates in order to reach the conclusion and so to form a code of law. Among his disciples Abu Yusuf, Muhammad, Daud-at-Tai, Habbun and others are of importance. He was offered the office of qadi but upon his

35 Wilson, 9.
36 Abdur Rahim, 25; Pound, Jurisprudence, I. 32 (for an illustration).
37 Ibid, 26 citing Al-Ashbah wan-Nadhair, 116; Prof. Hafeezur Rahman, 40 etsq.

refusal was flogged and imprisoned by the caliph and the officials of the state, where he expired.

The interpretations by the Hanafi school of the Quranic texts are very valuable and show the abilities and studies of the Imam and his followers :

For example the Quran says, "They say, God hath begotten children; God forbids : To him belongeth whatever is in heaven and on earth; all is possessed by Him"! II. 10. Upon this verse, the comments of the Hanafi school runs :

"A child becomes free by being owned by the father (e. g. if the father has been emancipated while his son remained in slavery, and then purchases the son from his master). That is to say, everything on earth being owned by God, God could have no son: therefore ownership and sonship are used in the text as contrary notions; and therefore when ownership and sonship combine, the former must give way, and the son must become free".[38]

The commentators of the school infer that in the Quran there remains always a solution of every difficulty to reach a right conclusion. The Hanafi school, similar to the authoritative expounders of the Roman Law, characterized itself by strong common sense and a desire to take an account of the facts and logics of life, (as shown by above interpretations) as the school possessed a refined quality of conciseness and lucidity, for example, take another text of the Quran:

" Ye are the best nation that hath been raised up among mankind; ye command that which is just, and ye forbid that which is unjust, and ye believe in God". III. 106 :

The comment of the school is that Ijma or the concurrence of the Doctors of Law is a source or authority of

38 Mohd. Yusuf, Mohd. Law I. 69; Wilson, 10; Tufseeri-Ahmadi, 6-12 (1847)

law. [39] It shows the high faculties of minds of the jurists of the school regarding the circumstances of human life, as they took the intention of the actual wording of the Quran, for though centuries have passed, yet their methods of construction bear a high comparative value when compared in the light of modern statutory constructions in the field of search of the legislative intention.[40]

The chief works of Abu Hanifa are his small collection of traditions called Musnadul-Iman Abu Hanifa, Fiqhi-Akbar (upon whose creation disputes among jurists exist) and of the school are Kitabus-salat, Kitabul-zakat, Emla, Kitab Ikhtilaf-ul-Imsar, Kitabul-Khiraj, Kitabul-Jawame, written by Abu Yusuf.[41] This school is largely followed in the Muslim world, for its followers are found in India, Pakistan, China, Iraq, Syria, Cyprus, Turkey, Jordan, Sudan, Israel, Egypt, and Libya.

THE MALIKI SCHOOL

It was established by Imam Malik-ibn-Anas (713-95 A.D.) who was a great jurist of the city of Madina. He held the position of Mufti in the sacred city which was a home of traditionary learning. He was considered as the highest authority in learning and also a great jurist of the time, and Muhammad, the disciple of Abu Hanifa was his student. His theories leaned more upon traditions and

39 Ibid. 72; Ibid; Ibid.

40 Compare : "words generally have different shades of meaning and are to be construed if reasonably possible to effectuate the intent of the law-makers ; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering as well, the context, the purposes of the law, and the circumstances under which the words were employed". Cf. Curtis, A Better Theory of Legal Interpretation, 3 Vandt. L R 407 (1950) citing Vermila-Brown Co. V. Connel 335 U. S. 377 (1948), Shell Co. Case 302 U. S. 253 ; see also Maxwell, Interpretation of Statutes.

41 Abdur Rahim, 26-27 ; Abdus Salam Nadvi, Tarikhi-Fiqhe-Islami, 382; For a systematic treatment of the authorities esp. in India see Prof. Hafeezur Rahman, 46-56.

usages or Sunna of the Prophet and the precendents of the companions of the Prophet.[42] He added to the main sources of the law i. e, the Quran, Ahadith or traditions, Ijma, Qiyas, a fifth one called *Istadlal* or the doctrine of public good, which was a principle of juristic deductions but not analogy as in the Hanafi school. As he was a judge, sitting in public and meeting the people and also being in the direct line of the Prophet, with environments, he may be looked back in a line of Canon lawyers who sat in his place doing the same things, and here lies the reason of his difference from the Hanafi school on point of practicabilities.[43] He wrote the great book called al-Muwatta available even now, which contains traditions and his juristic view upon them. On the matters of practical importance, his one tradition at least which is related to Muadh (the Qadi) and the Prophet's question regarding individual opinion is creditable to him.[44]

While the Hanafi school became current in Arabia and Iraq, the Maliki school went westwards along the North-African coasts. It spread over to the whole of Africa, upper portions of Egypt, (or United Arab Republic), Sudan, Libya, Tunisia, Algeria, Morocco, and the Central African territories, South-west Africa, Gambia, and the northern parts of Nigeria. It is also followed in the eastern coasts of Arabia, on Persian Gulf i. e. Kuwait, Hasa, Bahrayn and Trucial Uman.[45]

THE SHAFII SCHOOL

It was established by a pupil of Imam Malik named Imam Muhammad-ibn Idris Ash-Shafii. He was also related to the Prophet and was born in Palestine (767-820 A. D.). He was a born genius as it is said that he was

42 Abdur Rahim, 27-28; Wilson, 11.
43 Macdonald, 99-101.
44 See Mishcat-ul-Masabih I. 404 cited in Wilson, 11.
45 See Prof. Schacht in Law in the Middle East, 69.

accepted as an authority and delivered lectures on jurisprudence at an early age. He was a man of balanced judgement and examined the traditions critically, and allowed greater scope to Ijma than Malik and put a liberal interpretation on the dictum of the Prophet that "My people will never agree in error". He accepted Malik's Istadlal as a fifth source of the law, but rejected Hanifa's juristic equity or *Istihsan*.[46] He wrote the first treatise on Usul or principles. He worked to mediate and systematise the sources in order to draw rules of law.[47] As regards the sources of the law, he said in one of his books that, "The basis of legal knowledge is the Koran, the Sunna, the Consensus, the athar, and the qiyas based on these. The scholar must interpret the ambiguous passages of the Koran according to the Sunna of the Prophet, and if he does not find a sunna, according to the consesus of the Muslims, and if there is no consensus, according to the qiyas."[48] The system to which he gave his name mixed strict adherence to the now established Prophetic tradition (which he distinguished from Medenian traditions) with a modification of the Hanafi method in the form of analogical deduction (qiyas).[49] He held that in the Quran, every event and its solution is provided.[50] He himself wrote various authoritative books and some of them as for examples Ikhtelaful Hadith (the chief important work), Risa-la-Fiddatul-Ahkam, Kitabul-Umm, Jama-ul-Ilm, Ibtalul-Istihsan of great worth and value.[51]

46 Abdur Rahim, 29 on the authority of Al-Mankhul, 213-5; see also Khadduri, Islamic Jurisprudence (translation of Shafii's Risala) 1961 Ed.
47 Macdonald, 104; see Prof. Schacht, Origins. for critical and comprehensive modern analysis of the school and its works especially of the founder.
48 Prof. Schacht, Origins. 134 citing al-Risala, 70.
49 Gibb, Mohammadanism, 82 (Paperback Ed. 1955)
50 Prof. Schacht, Origins. 136.
51 See Abdus Salam Nadvi, Tarikhi-Fiqhi-Islami 403 etsq; see also

This school began in Cairo, and is found now in the lower parts of Egypt, in the Hijaz, Aden, Hadra-maut, Yaman, Eritrea, Kenya, Tanganyika, Somaliland, Central Asia, Malabar and Coromandal Coasts of India, Malaya, Thailand, Indo-China and the Phelippines.

THE HANBALI SCHOOL

It was established by Imam Ahmad Ibn Hanbal (780-855 A.D) who was born at Baghdad and founded the fourth school. He studied law under different masters including Imam Shafii. He is accepted to be more learned in traditions than in the science of the law or jurisprudence. In law, he was rigid to the traditions, a much larger number of which he felt himself at liberty to act upon than did any other doctor and put liberal interpretations upon them and allowed a very narrow margin to the doctrine of agreement and analogy.[52] Being a man of great piety and independent in views, he was persecuted by the caliph. He was the only one among the founders of the four schools who, besides being a jurist, had a recognized status in the independent science of Hadithes or traditions, as the one who collected and expounded them.[53] His followers being regarded as reactionaries, and troublesome were persecuted from time to time and now this school, it is submitted, consists of a limited followers.[54]

His great work, a collection of fifty thousand traditions known as 'Musnadul-Imam Hanbal' is a valuable literature, and he wrote on Usul, books known as Taat-ur-Rusul, Kitab-ul-Mashakh and Munsukh, and Kitab-ul-Alal.[55] There were Hanblis in Persia before the Shia domination, and so

Khadduri, Islamic Jurisprudence (translation of Shafii's Risala) 1961 Ed.; For Shafii authorities see Prof. Hafeezur Rahman, 56-57.

52 Abdur Rahim, 29.
53 Wilson, 17.
54 Abdur Rahim, 29; Wilson, 17.
55 Abdur Rahim, 30; Abdus Salam Nadvi, 357.

also in Syria and Palestine. It got a new revival by the Wahabi movement since the eighteenth century and this school is hence officially recognized in Saudi Arabia and the eastern-half of the country called Najd, and also in Hijaz on the Persian Gulf.[56]

A REMARK

With the death of Imam Hanbal, the age of the great jurists of Islam came to an end, leaving the works of the later period as mere supplementary. Though the age of the great Imams produced teachers such as Sufyanuth-Thuri, Dauduz-Zahiri, Al-Awzai, etc. yet their systems remain extinct now. It can be safely said, as a way of evaluation, that the great Imams, though formally differed in details, agreed upon important points sufficiently, for all of them recognized the same sources of the law and thus are not to be distinguished as different 'sects' of the Sunni school, but instead were merely as distinct schools,[57] to be followed by the modern Muslim Communities throughout world. The great Imams, were the first to formulate the principles of the science of Usul which is an important part of the legal system of Islam.[58] During the period the science of traditions were much enriched for the names of the great men such as Abu Abdillah Muhammad Abu Ismail-al-Bukhari, Zuhri, Ibn Juraij, Muslim ibnul-Hijjaj called Muslim, Tirmidhi, Abu Daud, are of great importance as they strengthened the positions of the jurists of Hijaz or the upholders of traditions especially of the Shafii and Maliki schools.[59] Further, the Quran was interpreted and authoritative commentaries were written upon it, and the legal science and institutions of Islam were developed.[60]

56 Prof. Schacht in Law In the Middle East, 70.
57. See Gibb, 82.
58. Abdur Rahim, 34.
59. See Abdur Rahim, 30 etsq.
60 Ibid. 33 etsq. for details.

The Anglo-American and the European legal systems and sciences of jurisprudence have great controversies regarding the bounderies of jurispundence, for they disputed among themselves upon the pure science of law, functional jurisprudence, teleological and historical jurisprudence. Jurists of each of the school of thought, concentrated upon the abstract theory of law, wishing to discover the elements of a pure science which will place jurisprudence on the same foundation of the objective factors which will be universally true, instead of remaining upon the shifting sands of individual preference or the particular ethical or sociological views.[61] Yet, it is a true fact, that these schools are complementary and not being opposed, exert upon their ulterior purposes of the law as a way to give a better order in the human community. The same theory when seen generally has a similarity, when we study the Islamic legal institutions and laws along with the schools of thought as an essential factor of the religious and social conditions of the daily life of the community. But it is to be noted that unlike the western systems, the Islamic theory of legal sciences is not a purely formal science remaining devoid of other essential factors of life. The Islamic system, includes in its scope the discussions of theories and general properties of the law, its application to a man's actions through the medias of rights and obligations with the classification of the legal concepts, by introducing the principles of *Usul* into the science of the law.

THE PERIOD OF COMMENTARIES

After the end of the third century of the Hijra era, the Muslims lost their push, zeal and thirst for learning and love of research. The decline was set in every way of life and the age of corrupt ways began to be called the

61 Paton, 3; Pound, Fifty Years of Jurisprudenoe, 50 H.L.R. 557 (1937), 51 H.L.R. 444, 777 (1938), Interpretations of Legal History (1923); Encycl. of the Social Sciences VIII. 477; Stone, Province and Function of Law (1950).

fourth period of the Islamic legal history. But as compared to other nations, Islam with its glorious past, was superior to the cultures of other civilizations. In the field of jurisprudence and sciences of law, Islam became confined to the limits set up by the great Imams and their schools in writing voluminous commentaries. The influence of the commentators are in no way less but has greatly influenced the future shapes of the legal theory with expositions under the foot-prints of the respective schools.

The case-law of the Anglo-American jurisprudence has become voluminous and influenced the administration of justice in every shapes of litigation. Similar, was the part played by the Islamic commentaries in the development of the law and its institutions. The western judicial precedents contain the most certain evidence, and the most authoritative and precise application of the rules of the common law.[62] The acceptance of the doctrine of stare decisis was a gradual one and it was not until the latter half of the nineteenth century that even in England the doctrine became established in its most rigid form, and at the present time even the House of Lords is bound by its own decision unless the rule is changed by a statute.[63] If the rule has been acted for a long period of time, the courts are slow to upset it, but if the prior decision does not cover the points raised in the subsequent decision, it is not controlling, for the social change must be critically analyzed.[64]

In the Sharia, the successor jurists to the great Imams devoted their attention to create questions not covered by the founders of the different schools and collected and arranged the opinions of the masters in order to determine

62 See Kent's Commentaries (7th Ed. 1851) 523-526.

63 Catlett, Development of the Doctrine of Stare Decisis and the Extent to which it should be applied, 21 Wash. L.R. 158 (1946); see also Friedmann, Legal Theory, Ch. 4 (3rd Ed. 1953).

64 Ibid; see also Salmond, Jurisprudence, Ch. 7, and 8 (11th Ed.).

the conflicting versions and to represent the accepted ones. One of such jurist was Sadrush-shariat (1349 A.D.) of the Hanafi school.[65] The modern judges of the common law systems give their rulings when a case practically comes before them for decision, but the jurists of the Islamic system posed various kinds of hypothetical questions and answered them in the shapes of Fatwas or opinions, which are accepted as the precedents to be followed by the later generations. No case under the modern system of the Anglo-American Jurisprudence can be decided unless a glance is made to prior decisions of the similar type. Similarly all Muslim lawyers of the present day would undertake to answer a question of law by consulting prior writings.[66] Among the compilors of opinions or Fatwas, the names of Qadi Khan and his Fatwai-Qadi Khan, Emperor Alamgir of India and his Fatwai-Alamgiri are worth to be mentioned for the great achievements of learning, industry and research, as made for the compilations, of the Corpus Juris Secunndum, the American Jurisprudence the U.S. Codes, the Laws of England by Lord Halsbury and the Coke, Kent, and Blackestone commentaries.

At the closure of forteenth century, upon the Islamic law as a science of jurisprudence or Usul, the age of the commentators and annotators, contributed much and the names of Abu Bakr Jassassur-Razi, Fakhural-Islam Bazdawi;

65 Abdur Rahim, 35.

66 Ibid. Compare the opinion about the Civil law countries that what else might have been the prior views that French judges have been deprived of all initiative and their function consist of solely mechanical application of codes and statutes regarding the techniques and authoritative guides in legal reasonings, "It is now the tendency in France as it has been in England and the United States to emphasize the creative work of the courts, to reject a static conception of case law and code law;" David and Vries, The French Legal System, 79-80; see also Ancel, Case Law in France 16.J. Comp L. and Int. Law (3rd. ser.) 1-17 (1934); Goodhart, Precedent in English and Continental Law, 50 L.Q.R. 40-65 (1934); Friedmann, Ch. 4.

As-Sarakhsi, and others of the Hanafi school, Abu Bakr Muhammad ibn Abdullah, An-Nawai, Tajuddin-us-Subki and others of the Shafii thought, Ibn Hajib, Qadi Udud of the Maliki school and Qadi Alauddin, and Zaidi-ni-l-khariji of the Hanbli school cannot be lost in history.[67]

THE MODERN PERIOD?

The general trend of authorities regard the fourth period to be continuing to the modern and present times. They put the argument of the doctrine of Taqlid or following by arguing that though the Sunni theory does not preclude recognition of a new teacher, yet the Sunnis should remain slow to accept any new doctrine radically different from those of their schools[68] Upon a review of the development of 'Sharia' throughout the Islamic world and upon their critical examinations, it may be said that a fifth period of the legal history is in the offing. The modern Islamic countries have adopted and continue to do so, by taking some forms from the western legal institutions into their own, impliedly or expressly in order to fit it more to social changes of the modern world, and their sysems seem in a state of fervance, when we see the laws of some Muslim countries like Turkey. Egypt, Tunis, Labanon and others.[69] Of course there is no departure from the basic and fundamental principles of the Sharia system by these countries, as it is the inherent characteristic of the Islamic system, to adjust its laws and institutions to the intellectual and social engineering interpretation of the modern world. In several countries such as Saudi Arabia, Yaman, the law is still largely based on the Quran and other religious sources;[70] yet the Civil Codes of Egypt (1949), Syria (1948) and Iraq (1951, 1953) where the western

67 Abdur Rahim, 36-37.

68 Ibid. 17, 175, 191-192; see also Abdus Salam Nadvi, Tarikhi-Fiqhi-Islami, 467 etsq.

69 Prof. Anderson, Islamic Law In the Modern World. (1959).

70 See Hart, Application of Hanbalite and Decree Law to Foreigners in

influences were strong in the first part of this century are seeking a combination between the Islamic teachings and the western legal institutions.[71] For instance the Iraqi Civil Code's Article 1 Sect. 3 provides that, "In all of this, the court shall be guided by judicial decisions and by the principles of jurisprudence in Iraq and in foreign countries whose laws are similar to those of Iraq".[72] The Islamic Law and the modern world will be discussed in a separate chapter, yet at the present discussion, I agree with certain reservations, with the view of Fyzee that, "Strictly the fourth period extends to 1922, the abolition of the Caliphate or 1924, the abolition of the Sultanate of the Turkish Requblic. For, after that, Sunnite Islam has no generally recognized head, and we may be said to be living since then in the fifth period wherein great inroads have been made by the secular law (qanun) into the domain of the sacred law (shariat) in all the Muslim countries".[73] It is submitted, that since the Umyyad Dynasty the Islamic community has been led to follow a *Siassa Madania* or secular policy, as opposed to the *Siasa Sharia* or policy of divine origin, and since then Islamic theocracy existed only in theory, hence with the modern developments, the fundamental structure of the Islamic thought will be preserved and the inherent balancing adjustive principles of the Sharia shall be maintained with the proper receptions for the unprovided

Saudi Arabia, 22 Geo. W.L.R. 169 (1953).

71 Schlesinger, 194 etsq; see The Closing of Mixed Courts of Egypt, 44 Am. J.I.L. 303 (1950); Liebesny, Religious Law and Westernization in the Moslem Near East 2 Am. J. Comp. L. 492 (1953); Impact of Western Law in the countries of the Near East, 22 Geo W.L.R. 127 (1953).

72 Schlesinger, 195; Jwaideh, The New Civil Code of Iraq, 22 Geo. W.L.R. 176 (1953).

73 Fyzee, Mohd. Law, 25; see also Anderson; Islamic Law in the Mordern World (1959), Recent Development in Sharia Law in Muslim World XL. 244 etsq. (1950).

for, permissible cases.[74]

§ 3 The Shia Schools

The Shia sects agree generally in their veneration for 'Ali' the fourth of the Enlightened caliphs, and reject of his three predecessors Abu Bakr, 'Umar' and 'Uthman'. The reason of it is that they recognize 'Ali' as being closely loved by the Prophet and owing to his family ties was the direct heir to the Prophet. In other words they may be described as the supporters of the principle of Divine Right as they accept 'Ali' as the chosen representative of God, as opposed to the principle of Democratic Election of the Sunnis, and it is submitted, that since the election of Abu Bakr as the first caliph, the unanimity of the Islamic people became incomplete from hereon.[75] Upon this theory, the school's general theory has been built that all their Imams subsequent to 'Ali' (who was also the Prophets' cousin) were descended also from Fatima and hence were the direct and lineal descendants of the Prophet himself.[76]

The main theories of the Shia schools revolve upon the political, psychological and religious characteristics and shapes in Islam. Politically, they favour to entrust the Caliphate to Ali and his descendents psychologically,

74 See Prof. Saba Habachy. Islam: Factors of stability and change 54 Col. L.R 710 (1954).

75 Browne, A Lit Hist. of Persia (until Firdausi), 391 (1919), (It may be noted that 'Ali' was married to the daughter of the Prophet named Fatima); see also Rashidud-Din-Fadlu-llah. Jamiut-Tawarikh.

76 Ibid. 392. Note the alleged fact that all the Imams subsequent to al-Husayn (the third), were the lineal descendants of the Sasanians, the Persian Royal Family. It is said that Husayn the son of Fatima and Ali married Shahr-banu called also as-Sulafa and shahi-Zanan, the daughter of Yazdigird III, the last Sasanian King and hence the remaining Imams of the Twelvers and Ismaili Shia represent both the prophetic and kingly right and virtue. Hence the Shia theory has had great influence from the Divine Right of the House of Sasan as compared to the democratic ideas of the Arabs. See Ibid. 130 etsq. and the authorities cited.

they want to concentrate the focus of love and devotion to the person of the Prophet, and religiously, to establish a central authority for the church of Islam, infallible and supreme, with the mixture of law, religion and politics.[77] They agree with the Sunnis that the Quran, the Sunna or the traditions of the Prophet are the foundations of the law; yet they do not admit the genuineness of any tradition which is not received from the Ahl-i-Bait or the People of the House consisting of Ali, Fatima and their descendants or adherents and they hold further that the oral precepts of the Prophet are in their nature supplementary to the Quranic texts as their binding effect depends upon the degree of harmony existing between them and the legislations contained in the Quran, as opposed to the Sunni doctrines that the concordant decisions of the successive caliphs and the general body of jurists as supplementing the Quranic rules and legislation along with the basis of traditions of the Prophet.[78] Hence they reject Ijma, Qiyas, Istihsan or Istislah, but hold on the basis of Imamate principle that what-else come from the Imams (*ma jaa minal-aimma*) there is no other source.[79]

In their doctrine of the Imamate, the Shia schools believe that the supreme spiritual authority must be vested in one of the Ali's descendants, being designated in each case by his predecessor, and endowed with supernatural or even divine attributes, and upon this belief they establish a central, supreme authority for the church of Islam.[80] They say that the Imam is the proof of God, who upholds His command and remains the Lord of the age, and as he is that mysterious, logical and spiritual principle who binds the whole universe together, he is

77 Fyzee in Law In the Middle East, 113; Gibb, 95-98; but see Ameer Ali. Mohd. Law II. 8 for opposite views.

78 Ameer Ali II. 6-7

79 Fyzee in Law in the Middle East, 127; Ameer Ali II. 7.

80 Browne, 296.

the final authority in both law and religion.[81] Upon this theory, it may be said that their general opinions are, firstly, that the peculiar designation of the Imam and the testimonies of the Quran and Muhammad (the Prophet) concerning him are necessary points, secondly, that the Imams ought necessarily to keep themselves free from light and grievous sins, and thirdly, that every one ought to declare publicly who it is that he adheres to, and from whom he separates himself, by word, deed, and engagement, and that herein there should be no dissimulation.[82]

As the Shia sects hold that 'Ali' was the first legitimate succes or to the Prophet owing to his family ties and marriage with the daughter of the Prophet, they allege that after him, his eldest son Hasan, the second, Husayn, the third, and Zeen-al-Abideen, the son of Husayn was the fourth in the line of Imams respectively. Upon the death of the fourth Imam, a schism arose in the sect, and a part adhered to one of his son called Zeyd (from which arose the Zaidiyya shia sect), while the greater part of them acknowledged another son called Mohammad Baqir as the fifth Imam. The fifth Imam was succeeded by his son Jafar-al-sadiq as the sixth Imam, and these two are the great heads of the Imamea sect. Jafar-al-sadiq appointed his eldest son Ismail to succeed as Imam, and his premature death nominated the second son Moosa Kazim as the successor for the Imamate. This gave rise to another division in the sect of which one was to be called Ismailias, while the majority adhered to Moosa Kazim or Moosey Raza as the seventh Imam and this sect was called the Ithna-a-Asheriahs or the Twelvers, following twelve Imams. The last of these Imams is believed by them (the Twelvers) to have withdrawn for a time from human

81 Fyzee, 115; Sale, Transl of the Koran. Prelim Discourse, 136.

82 Sale, 136. It is to be noted that upon the third point the Zaidiyya shia dissented from the rest.

observation and remaining still alive will return as the last Imam Mahdi or the true Messiah to fill the earth with justice, but it is to be noted that this is not so accepted by the Ismailias, who believe that he cannot disappear completely, and is invisible from the worldly eye, for if the Imams were to so disappear from the world, the earth would come to an end.[83]

As seen above, the Shia sects are sub-divided into several sub-sects. The first is the Ithna Asharia sect having two schools of thought. The first is the Akbari school, the followers of which are traditionists rigidly following the principles of the Mujtahid who is the servant of the Imam and his teachers. The other sect is of the Asuli school, who interpreting the Quran in the light of the daily life give scope to reason and thereby reject the traditions not in conformity to reason. The parent sect's followers are common in India, Pakistan, Iran and Iraq. The followers of Imam Ismail are the Ismailies, who are divided into two sects. The one are those who believe in Aga Khan and his ancestors as Imams, and the other who believe that Imam Abul Qasim-al-Tayyab was the last and the twenty-first Imam. The Ismailias are found in India, Pakistan, Central Asia, Iran, Syria and the Persian Gulf and the Indian Khojas and Bohras belong to this sect. The third sect is of the Zaidiyyas, who follow Imam Zaid, the son of Imam Ali Asghar as the fifth Iman, and they are not found in India, yet are concentrated in Yaman by combining the sunni and the shia doctrines of law and religion.[84]

83 See Baillie, Mohd. Law (Imamea Code) II. Intro.; Browne, 296; Sale, 136. Note the view that Zaidiyyas are related to Zaid bin Ali bin Al-Husayn bin Ali bin Abi Talib, who revolted against Hisham bin Abdul Malik in Kufa and many of them revolted against the Umyyad and Abbissid caliphates with some successes at some places : Cf. Abdus Salam Nadvi, Tarikhi-Fiqhi-Islami, 368.

84 See Fyzee, 116 etsq; Mohd. Law, 100 etsq; Wilson, 21; Mulla, Mohd. Law, 25; Ameer Ali II. 8.

The main reason of the differences among the shia sects and sub-sects lies not so much on the interpretation of the law as upon the doctrinal points. The Ithna Asharia sect holds that Ali and the Imam (to appear), are possessed of certain miraculous or supernatural power and the Imam though not God is by no means the equal of the Prophet.[85] The extremists of the Shia sects for instance the Gholaites, as says Sale, carried the doctrine of veneration for Ali and his descendants so far, that they violated all bounds of reason and decency and "were so highly transported therewith, that they raised them above the degree of created beings, and attributed divine properties to them; transgressing on either hand, by deifying of mortal men, and by making God corporeal; for one while they liken one of their Imams to God, and another while they liken God to a creature".[86] The Zaidiyya sect, by limiting the manifestation of God in the Imam to 'right guidance' only, deny that the substance of God entered into human body of Ali, and the majority of the Shia schools hold that the Imam is inferior to the Prophet, as seen in the modern statistics.[87] Similarly, it is only the Ithna Ashari sect which holds the practice of Muta to be lawful, though others consider it as unlawful. The old Arabian custom of Muta or temporary marriage was later forbidden by the Prophet during the *Hajjat-ul-widaa* or the last Pilgrimage of the Prophet and confirmed by Caliph Umar, and its proof is stated in Fathul-Qadir.[88] The confirmation of the prohibition of Muta by the caliph seems to be main reason of the permission of the practice as lawful by the Ithna

85 Fyzee, 150.

86 Sale, 137; see also Fyzee, 116 citing Zahid Ali, Tarikhi-Fatimiyyin-i-Misr 218 (1948); Encycl of Islam, IV. 352.

87 Ibid.; see also Fyzee, A Shiite Creed, 95.

88 See Raddul-Mukhtar II 480; Ameer Ali II. 318; Spirit of Islam, 106 (1904); For the opposite view See Mo. Syed Ali Naqi, Muta and Islam, 193-230 (Urdu) 2nd Ed. 1937).

Ashari sect, and it is said that a theologian of this sect was asked about the legality of the practice, replied that "The believer is only perfect when he has practised a Muta.[89]" It is alse reported through a tradition of the Fatimid sect, that the practice is not proper.[90]

As the Shia sects attach much importance to the doctrine of Imamate, and the Mujtahids thereto, the institution of Pirs is unknown to them.[91] They hold that religion consists of solely in the knowledge of the true Imam and hence upon this theory consider th mselves to be the true muslims or *Aklu-ladl wal-tawhid* in order to distinguish from the sunnis to whom they call *ahlul-sunna wal-jamaa*.[92]

The best known treatises of the Shia schools are the Shara-ya-ul-Islam or the Suraya (see Baillie II : Imamea Code and Querry, Droit Musulman which are translations of this book in English and French respectively), the Mafath, the Irshadul-Allamah, Jama-us-Shittat, Mabsut, Bihar-ul-Anwar, Nail-ul-Maram, Jamai-Abbasi, Tahrir-ul-Akham, and some recent books as Daaimul-Islam, among others.

89 Fyzee, 128; Mohd. Law, 99; see also Ameer Ali II. 398; Baillie I 18, II. 39; Mo. Syed Ali Naqi, Muta and Islam, 193-230.

90 See Fyzee, 128 for the citation of the tradition and authorities

91 Mst. Hayat-un-Nissa v. Mohd. Ali. Khan I.L.R. 12. All. 290; Mst-Sardar Bibi V. Mohd. Bakhsh P.L.D. 1954 Lah. 480.

92 Fyzee, 121 citing Shaykh Saduq, Kitabul-Tawhid, 61 (1869); see also Baillie II. Intro., 215.

III

The Sources of Law

§ 1 Preliminary Observation

The term 'sources of the law' has many meanings and many theories have been elaborated around it. In other words, it is to be seen, that as to what remains the cause of the secret validity of law and from where comes the material to fashion the law, in order to make it fit for application. According to Holland the term denotes three meanings, the first is the quarter whence we obtain our knowledge of law, the second, is the mode in which or the person through whom, those rules have been formulated which have acquired the force of law, and the third, is the authority which gives them that source.[1] The philosophical school treats the term with deepest problems of legal philosophy, while Del Vecchio regards the term as being in the nature of man.[2]

According to Salmond, it is beneficial to distinguish between the formal and the material sources of law.[3] The formal source as defined by him is that from which a rule of law derives its forces and validity while the material sources are those from which is derived the matter not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law. The formal source of law is thus one, while the material sources are many and divisible into either legal or historical. The historical sources are unauthoritative but the legal material sources are authoritative and are recognized by the law itself. Salmond further says that the legal material sources of the Anglo-American Common Law are Legislation, Custom,

1 Jurisprudence, 48-49; see also Allen, Law In the Making (1958 Ed.)

2 Paton, 140.

3 Jurisprudence, S. 44 (9th Ed.)

Precedent, Professional Opinion and Agreement. Later on, he distinguishes the legal material sources of law and the formal source from the literary sources, and holds that the literary sources "are the sources of our knowledge of the law or rather the original and authoritative sources of such knowledge as opposed to later commentary or literature." Here the English Year Books, the Statute Books, the Reports and authoritative original text-books are the sources of our knowledge of the law, while the literature as opposed to the sources are comprised of all modern text-books and commentaries.

Applying Salmond's theory, the formal source is the whole body of the Islamic Sharia rules of law ordained by God. In his theory of legal material sources may be fitted the Quran (or to fit it more in the literary sources), the traditions of the Prophet, Ijma, Qiyas, etc. of the Islamic sources of the law. However, owing to the special and unique position of the Islamic Sharia along with the width of its applications, the classification theory of Salmond may not be of much help in giving more scientific classification of the Islamic sources of the law. Moreover, the term 'sources of law' is, as the scholars of jurisprudence know, ambiguous for a considerable degree of confusion still exists in not discriminating and differentiating the various senses the term is capable of conveying to the modern mind.

The Islamic world conceives of the Sharia as having sprung up from four principal roots or sources along with some minor sources, and all authorities of the legal system base their opinions on them. They are :

1. The Quran (the word of God);
2. The traditions or Sunna of the Prophet;
3. IJma or consensus of opinion of scholars;
4. Qiyas or analogy.

Discussing the relative weights of the original and

secondary authorities, it has been observed that the courts have held themselves bound to accept the inferences drawn from the Quran and the traditions in the standard medieval text-books in preference to what might appear to the judges a more correct inference.[4] The schools of the Sharia differ in some minor details in acceptance of some sources. The Shafii school accepts Ijma and Qiyas in a qualified degree by using different terms in expounding inferential conclusions, while the Maliki school taking a medium position checks the speculative deductions of the Hanafi school. The Hanbali school stresses upon the literalist interpretation of the traditions, but does not reject Ijma and Qiyas.[5] The Quran and the traditions are called *al-adillat-qatiyya* or absolutely sure arguments, while Ijma and Qiyas are called *al-adillat-al-ijihadiyya* or arguments obtained by exertion.

Though, "the classical theory of Muhammadan Law as developed by Muhammadan jurisprudents, traces out the whole of the legal system to four principles, or sources, the Koran, the Sunna of the Prophet, that is his model behaviours, the consensus of the orthodox community, and the method of analogy",[6] yet some modern writers, such as Muhammad Ali, departing from above, hold Ijtihad as the third source, by grouping Ijma and Qiyas under it.[7]

§ 2 The Quran

The foremost source of the Islamic Law is the Quran which is the Book of God. Every word of it is the utterance of the Almighty communicated in His actual

4 Wilson, Digest of Anglo-Mohd. Law, 92 citing Aga Mahmomed Jaffar V. Koolsom Beebi 25 Cal. 9 (1897): 24 I. A. 196.

5 Ibid.93.

6 Schacht, Origins of Muhammadan Jurisprudence; 1 (1950); Prof. Hafeezur Rahman, 9 etsq.

7 See: The Religion of Islam, 96;on sources in general see, Payne,. The Sources of Mohd. Law, 48 Am.L.R. 884-900 (1914).

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words by the angel Gibriel the Holy spirit, to the Prophet of Islam.[8] The Quran was revealed by God to the Prophet through *Wahi Jali* or manifest revelation and its present contents are the same as originally revealed to the Prophet and no change has been made even in a single word eversince. God promised in the Book itself saying, "Verily, we have sent down the Reminder, and verily, we wil guard it". XV.9 (Palmer's transl.,). The words of God continue to be performed in a wonderful and miraculous degree since the days when the Quran was revealed.

The Quran is actually the real foundation on which the whole structure of Islam rests. It is the main source of the Islamic laws and its five hundred texts constitute the whole range of the Islamic sources of the Sharia. Though it could be said to be chief source of the Sharia, as other sources rank equally under certain circumstances, yet it is an absolute and final authority in large fields of discussions relating to the principles and rules of human conduct of Islam.[9] Every Muslim sect without any reservation accepts its authority in every field of social and individual life.

It was revealed in parts to the Prophet during a space of twenty three years, and most of the verses embodying the rules of law, were to settle down practical questions. For example some were to abolish customs against public policy as infanticide, usury and other social reforms in relation to the raising the status of women and equitable division of the matters of inheritance and succession.[10]

8. See Prof. Fitzgerald in Law In the Middle East, 87; Bahari-shariat I. 12 etsq.

9 Note: Quran II. 180-182, 221, 226-237, 240, 241, IV. 1-6, 1-12, 15, 19-25, 32-35, IV. 127-130, 176, V. 5, XXIV. 2-9, XXX. 38, XXXJII. 49 60, LVIII.1-4, LXV. 1-7; see Mohd Yusuf, Mohd Law, I; For a copious treatment of the Quranic Verses specifically and directly dealing with rules of the Islamic law See Prof. Hafeezur Rahaman, 11-30 (1952); Abdus Salam Nadvi, Tarikhi-Fiqhe-Islami (1961).

10 Abdur Rahim, 70

It is most copious on marriage and divorce, most precise in the rules of inheritance, and if compared to Christianity (Bible), possesses far greater vitality and responsibility, for instead of being arbitrary and despotic, it has true democratic characteristics in form and substance".[11]

The Quranic verses being direct revelation, possess unchallangeable authority as the Quran itself challenges: "Say, 'If mankind and jinns united together to bring the like of this Quran, they could not bring the like, though they should back each other up' ". XVII. 90 (Palmer's transl.). It contains the religious, civil and moral codes of the Muslim people and regulates their life in every shapes. It was revealed in the Arabic language and being the very words of God is objective in nature, instead of being a subjective revelation. When one reads in the Quran, as for example, "Qul Huwa'llah Ahad" ("say: He, God is one") God Himself is the speaker, not the Prophet, and therefore the Muslim in quoting His scripture, employes the formula, "He says, exalted is He", while only in quoting the traditions of the Prophet does he say, "He says, upon him be the Blessing of God and His Peace".[12] The reason of the revelation in Arabic, it is submitted, was the selection of choice for perfect expressions, explanations, and forms. For it has been said that as a scientific language Arabic was eminently fitted by its wealth of roots and by the number of derivative forms, each expressing some particular modification of the root-idea of which each is susceptible.[13]

It is totally artificial to affix the Prophet of Islam about the creation of the Quran, for the critics overlook the facts that the Prophet was' "Ummi", lit. 'unlettered', which means that he was not versed in human learning,

11 Ref. Wilson, 489; Speeches of Sir Edmand Burke I. 104-105.

12 Browne, A List. History of Persia (until Sadi), 4.

13 Ibid, 7; see also Sale, Transl. of the Koran, Prelim. Discourse, 20.

yet being full of the highest wisdom was possessed of a most wonderful knowledge of the previous revealed scriptures and which was a proof of his inspiration,[14] for the Quran itself emphatically declares about it, and mentions previous revelations as they became corrupted and unreliable and required repeals and modifications with the changing notions of time.[15]

Everything lawful and essential for a happy social life of the world is contained in the Quran and explained by it that "we have turned about for men in this Quran every parable; but most men refuse to accept it, save ungratefully". XVII. 91 (Palmer's transl.). It is doubted by some scholars about the Quran as a sufficient source of the Islamic legal theory, and though the critics may be possessed of refinements, yet perhaps the fact cannot be overlooked that it regulates the daily individual and social life of the Muslim community. Unlike a lawyer brought up in the common law traditions, to a Civilian lawyer, a code is a comprehensive, and especially in the area of procedure often an all-inclusive, statement of the law, for in its interpretation, the court is always conscious of the inter-relation of all the provisions contained in the whole code and the intention of the legislator, where it can be ascertained will not be disregarded.[16] Similar remains the case of the Quran which is the primary

14 A. Yusuf Ali, I. 389

15 See Quran VII. 156-157; see supra Ch. II.

16 Schlesinger,1 77-178 referring Deak and Rheinstein, The Development of French and German Law 24 Geo. L.J. 551 (1936); Stone and Pettee, Revision of Private Law 54 H.L.R. 229 (1940); see also, Bonnecase., J., The Problem of Legal Interpretationi n France, 12 J, Com. L. & Int. L. (3rd series) 79 etsq. (1930).

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authority for the regulations of the human life, on the basis of the cardinal tenet of Islam that God is one and so His 'Law' is a single whole.

The Quran has two kinds of verses, the first of which are the decisive verses which are the basis of the Quran, and the second are the allegorical verses whose meanings are either known by God or those who are well-grounded in knowledge, for the Book of God says that "He it is who has revealed to thee the Book of which there are some verses that are decisive, they are the mother (or the fundamental part of it) of the Book; and others ambiguous (allegorical); but as for those in whose hearts is perversity, they follow what is ambiguous, and do crave for sedition, craving for (their own) interpretation of it; but none know the interpretation of it except God. But those who are well-grounded in knowledge say, 'we believe in it, it is all from our Lord; but none will remember save those who possess minds". III. 5-6 (Palmer's transl.). It follows that in interpreting the Quran, the meaning should be sought in the Book itself and the interpretation of one passage must not be at variance with any other passage, more specifically with the basic principles laid down in the decisive verse. The explanation of the Quran, should hence firstly, be sought in the Quran itself, for its hint at one place is expounded and explained at another place. As it has allegories with metaphors along with plain and decisive words so such passages must be interpreted strictly in consonance with what is laid down in clear and decisive words and not at variance therewith. When a principle or law is given in clear words any statement carrying a doubtful signifance or statement apparently opposed to the law so laid must be interpreted subject to the principle enunciated, and so also, that which is particular must be read in connection with and subject to more general statements.[17] The courts must not as a rule attempt

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17 See, Mohd. Ali, The Religion of Islam, 46; Abdur Rahim, 77 etsq.

to put their own interpretation and construction on the texts of the Quran in opposition to the express rulings of the commentators of great authority.[18]

In interpreting two conflicting texts of the Quran, the best method is that "where two speeches of a general character conflict, one of them sanctioning a certain thing in general words and another prohibiting it, the prohibitive speech will prevail. It is laid down in the Quran: 'O you may have such (women) as your right hand has acquired (meaning slave girls)' and in another verse it lays down; 'do not bring together under you two sisters.' It is said that 'Ali' was of opinion that the restriction with respect to combining two sisters did not apply to slave girls, but only to the case of a person marrying two sisters at the same time. The Hanafis, on the other hand hold the contrary view on the ground that the "prohibitive text must prevail over the affirmative text."[19] Similarly two apparently conflicting propositions ought to be reconciled if possibility to do so exists, but a Quranic text cannot be repealed by any other source of the Islamic law except by the Quran itself.

A master of law scholar when completing his researches of the Sharia enters the domain of the doctor of law studies, turns generally into the writer of commentaries upon the Quran through the science of its interpretation or Tafsir. Though the Quran is itself the best commentary, yet some of the best talents of the Muslim community wrote commentaries upon the Quran which remain of the highest importance and authority in the Islamic common law. It is beyond the scope to enumerate all the commentaries, yet for our present purposes, those written by Tabari (died in A.D. 922), Zama-Khshari (died in 1143 A.D.), Baidawi (died 1286), Ghazzali

18 Aga Mohd. Jaffer V. Kulsum Bibi 25 Cal. 9 (1897)
19 Abdur Rahim, 82 etsq. on the authority of Taudih, 33,

(died in 1459) Fakhruddin-Razi, Mulla Jiwan, Abul Qasim Husain Ragib, Jalaluddins and others are worthy of great merit and authority.[20] The Quran has been translated in almost every language spoken by the Muslims, and commentaries or bare translations of the Book of God are found everywhere in the world.[21]

§ 3 THE TRADITIONS OF THE PROPHET

The paths or the practices of the Prophet himself are the most clear sources of information of the Laws of God, and they may be compared in similarity with the recorded Common Law in the decisions of the year Books and Reports of the early history of the English Law.[22] The traditions or the Sunna i.e. the model behaviours of the Prophet are the second source of the Islamic legal system.

The literal meaning of the term Sunna is 'a path' or 'a manner' of life or the practice of the Prophet and to some jurists it also includes the practice of the four Enlightened Caliphs and other approved companions of the Prophet. The conduct and sayings of the Prophet had always been looked upon as supplementing Revelation, but the opinion has now gained ground that every act of his and his most casual utterances had the authority of inspiration,--"I leave with you" (he is supposed to have said) "two guides, which if you follow faithfully you will never go astray, the Quran and my practice (sunnat)". It is of an interest to note that the entire system of the Islamic law, as well as of theology, ritual, and private ethics, has actually been built upon, from these two foundations. The text of the Quran,

20 Abdur Rahim, 33.
21 See for details: A. Yusuf Ali I. (Commentaries on the Quran) p. IX. etsq.
22 Prof. Fitzgerald,, 90; For a recent scholarly treatment about the position of traditions see: James Robson in the Muslim World, Vol. 41 pp. 22, 98, 166, 275 (1951); Prof. Hafeezur Rahman, 30-35 (1952) ; M. Hamidullah, Sahifah Hammam Ibn Munabbih (C. C. I. Pub. 2. 1961-Paris).

is one, universally accepted by all schools of Islam, but there are varying texts of the traditions (Hadith) recording the sayings and doings of the Prophet and when they are really applied, different schools of law emerge having own characteristic principle.[23] The Quranic texts were collected by authority of the state, but the traditions were not so collected. So as regards their being genuine, the jurists assigned a certain limit of time, counting from the death of the Prophet, within which if the tradition was narrated for the first time, a strong legal presumption arose in favour of accuracy of the tradition.[24] It is to be noted also that there lies a distinction between a Sunna and Hadith. The Sunna means the practices and precepts of the Prophet, while the Hadith tells what was the Sunna, thus in other words a Hadith enshrines the Sunna The importance of the Hadith lies in the fact that it is the best, most useful reliable source of our knowledge of the Sunna. Hadith or a tradition means 'news' or a tale or verbal communication of any kind.

The Sunna has been classified into three kinds :

1. *Sunna-al-Qaul*, i.e., the saying of the Prophet;
2. *Sunna-al-Fil*, i.e., the doing of the Prophet;
3. *Sunna-al-Taqrir*, i.e. the doings of others in his presence and without any objection on his part.

The classification of a Hadith or tradition is usually made by a reference to its subject-matter, for instance a tradition embodying a revelation from God in the language of the Prophet is called *Hadith-alQudsi*, secondly, with reference to the authenticity or strength of proof which may be *Mutawatir* or repeated successively, *Ahhad* or isolated, *Azir* or strong, *Ghaib* or unfamiliar. Thirdly, it may be classified with reference to the character of those who handed down the true tradition which may be *Sahih*

23 Wilson, 8,

24 Ref. Abdur Rahim, 72 for details.

or narrated by truly pious persons of character and integrity or *Hasan* or persons though not so pious but nothing was known against their integrity, and *Daif* whose narrator remains of questionable authority. Fourthly, it may be classified with reference to the personage whose action or saying is reported for example, *Marfu* or the exalted tradition, as a saying or an act related or performed by the Prophet himself and handed down in the form of a tradition, or *Mauquf* or restricted tradition where the act or saying was performed by a companion, or *Muqtu* or intersected tradition, which is a saying or an act performed by one of the successors of the Prophet. Fifthly, it may be classified with reference to the links in the chain of the narrators of the tradition which may be *Muttasil* or connected in the chain of narrators, *Muallaq* or disconnected or incomplete, *Munqata* or when the name of the narrator was missing in the middle and *Mursal* or such name of the narrator was missing in the end. Sixthly, they are classified according to the jurists for purposes of law and jurisprudence. Such *Ahadith* or traditions were *Mutawatir* or continuously followed or acted upon from the very beginning without any doubt of authenticity, *Mashhur* or which was at the beginning an *Ahhad* or isolated but was accepted as true by the scholars and became well-known during the first century of the Hijra year, and an *Ahhad* tradition or an isolated one which was reported by one narrator from another, but not having attained the status of a *Mashhur* tradition by the jurists.

The basis of the authority of traditions as a source of the law are the many verses of the Quran itself; [25] for example one of the verses commands that the directions and the orders of the Prophet ought to be obeyed, as the Quran says, "And what the Apostle gives you, take; and what he forbids you, desist from; and fear God, verily,

25 See Quran IV. 80.

God is keen to punish"! LIX.7 (Palmer's transl.).

All the schools of the Sharia without any reservation accept the authority of a *Mutawatir* or connected tradition, while they differ regarding others. The Shafii school attaches much importance to an *Ahhad* tradition, while the Hanafi school prefers an analogy to such a tradition. However, it is notable that the real difference of acceptability of traditions revolves around the role of traditions to prove the Sunna; and it is remarked that it is unnecessary to enter into the subtle details and reasons of the differences, for it is feared that the honest differences of opinions ended in hostile and unfair criticisms. As a way of illustration, the Shia sects accepted only the traditions reported by chain of reliable and qualified reporters from the Prophet's house or Ahl—Bait. Similarly the Maliki school will not accept a tradition because the companions or the followers have been acting contrary to it. Though at the beginning the difference existed honestly, but in the later years the bigoted followers of the great schools and their Imams, indulged into hostile and unfair criticisms, which resulted into the modern mutual criticisms.[26] So also the rationalists called the Mutazila school of thought (or Ahl-al-Kalam), basing their whole doctrine on reasoning and analogy hold that all traditions must be rejected except those which were established by continuous practice by the community as a whole. They interpreted the Quran and the traditions according to their outward meanings, by relying upon reasoning and analogy to test a tradition.[27]

26 See for discussion in Moulana Abus Salam Nadvi, Tarikhi-Fiqhi-Islami, 254 etsq.

27 Schacht, Origins of Muhammadan Jurisprudence, 44, 128, 258.

Ameer Ali took a view in 1880 that the "young generation is tending unconsciously towards the Mutazilite doctrines:" (Personal Law of the Mohamedans: (Preface to the First Edition), it is submitted that in the modern times the Mutazila followers are comparatively very nominal in number. Compare the movement

It is said that there has been much fabrications of traditions and it is submitted that in light of modern researches, the problem is of great worth for inquiries by a well-equipped band of scholars.

Many authoritative treatises have been written upon traditions, as for example, Sahi-al-Bukhari by Muhammad-bin-Ismail al-Bukhari, Sahi-al-Muslim by Ibn-al-Hajaj and others of Sunni schools, al-Muwatta by Imam Malik, Masnad Imam Ahmad Bin-Hanbal, Kitab-al-Umam by the Shafii school, and Tahdeeb-al-Ahkan by Muhammad Ibne-Ali, Jamia-al-Kafi by Muhammad Ibne-Yaqub of the Shia schools are even today considered as of high authority.

§ 4 Ijma or Consensus of Opinion

As a source of the Islamic law, an *Ijma* or the consensus of opinion of scholars is next in importance to the Quran and the Sunna or traditions of the Prophet, and it is said that a person who does not believe in it is a sinner. It is deduced from the Quran and confirmed by a tradition that God would not permit His people universally to be in error, for *Quod Semper, quod ubique, quod al-omnibus fid-libus* is no less a Muslim than it is a Catholic doctrine.[28] The reason of the doctrine may be said that, " as laws are needed for the benefit of the community, the Divine Legislator has delegated to it power to lay down laws by the resolution of those men in the community who are competent in that behalf, that is, the *Mujtahids* or jurists. The laws so laid down are presumed to be what God intended, and are thus covered by the definition of law as communication from God.[29] The legal theory of the ancient

of Jamaat Islami led by Moulana Maodudi in the recent years. See for recent movements in Islam : Smith, Islam In Modern Hitsory (1959).

28 Prof. Fitzgerald, 95.

29 Abdur Rahim, 53; compare the roles of Juristic Writings, Professional opinion and Text-books as a source of the western legal systems; see

schools of law was dominated by the idea of consensus and that they distinguished between the consensus of all Muslims called *Ijma-al-Umma* i. e. of both the scholars and the people on the essential points, and the consensus of scholars on the points of details called *Ijma-al-Aimma*, that they consider the consensus in both forms as the final argument on all problems, and not subject to error, and that it represents the common denomination of the doctrine achieved in each generation, as opposed to individual opinions (ray) which makes for disagreement.[30]

Though the schools of the Islamic legal theory differ as to the manner in which a consensus should come into existence, yet all agree in its sanctity and authority in relation to points of law and matters of religion. There are various texts of the Quran denoting the validity of the doctrine in clear and precise ways to make them accepted as a valid source of the law.[31] The Quran is stringent upon those who do not follow the doctrine, as it says, "But he who severs himself from the prophet after that we have made manifest to him the guidance, and follows other than the way of the believers. we will turn our backs on him as he hath turned his back; and we will make him reach hell, and a bad journey shall it be." IV. 115 (Palmer's transl.). The traditions of the Prophet also support the doctrine of Ijma.

As the religion of Islam does not admit the possibility of any further revelation after the death of the Prophet, the principles of Ijma are regarded as the only sources availed of now for further legislation in the legal theory, and its development for the sake of clarification of rules

also Pound, the Formative Era of American Law (1938); Jurisprudence (1959).

30 Schacht, Origins. 82; Macdonald, 101; Prof. Hafeezr Rahman, 35 etsq.

31 Quran IV. 59, III. 105.

of law not clearly covered and explained by the text of the Quran or by the traditions of the Prophet.[32] The Ottoman Family Law of 1917, is a best illustration of the support of the argument for making as compulsory the registration of Muslim marriages through the doctrine of Ijma.[33]

The doctrine has been interpreted differently by the jurists of the different schools, as for example, the Maliki school regards it in the opinions of the jurists and scholars of Madina, while the Hanbali school views it from the opinions of the companions of the Prophet. The Shia idea of the doctrine is the family of the Prophet and the Hanafi school holds that it is the consensus of opinions of the Mujtahids or jurists of any age, as compared to the Mutazila view of the majority of jurists.

As regards the conditions for the validity of the doctrine, it is said that it must not be against the text of the Quran or the Sunna, which are the fundamental principles of Islam and the agreements of the companions of the Prophet on a particular point have not to be reopened again. The jurists of a particular age must be unanimous to constitute an Ijma for only a majority is not sufficient and it may be based on a text of the Quran, or of Hadith or on an Analogy.

There are four types of Ijma. The first is the Regular Ijma of the companions, which has the highest authority; the second is the Irregular Ijma of the companions where it has been constituted by the opinions of the few companions with the silence of others without repudiation. In the third type, comes the Ijma of the Mujtahids of the later ages on a question which was neither raised nor decided during the time of the companions of the Prophet, while the fourth kind consists of the Ijma of the jurists of the later ages on a question about which there was a diffe-

32 Abdur Rahim, 54.

33 Prof. Fitzgerald, 95.

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An Ijma when validly constituted cannot be repealed, and especially an Ijma of the companions of the Prophet cannot be repealed, for it is argued that they were the best, most pious and truthful persons and lived in the best age, but subject to this rule, an Ijma of one age may be repealed or reversed by that of a subsequent age.[36]

There are certain difficulties in the formation of an Ijma, for some jurists take the view that there is no one to decide as to who should be a Mujtahid and in the absence of any machinery for the selection of such a person, there is no method to bring together all the qualified Majtahids in a conference for an opinion on any question of law and religion. The argument further enters into the field of the present circumstances that no one can even entertain even the single idea of bringing together the Muslim jurists of all the world with the least hope to get an unanimous opinion.[37] The other jurists say that it is not required that an agreement between the jurists be fixed in a council, but it reached automatically to its existence on any point perceived only on looking back and noticing that such an agreement has actually been attained, which is then consciously accepted as an Ijma. [38]

34 See Hughes, Dictionary of Islam, 197; Abdur Rahim, 128.
35 Abdur Rahim, 49.
36 Ibid. 128, 120-121.
37 Ibid. 135.
38 See, Shorter Encyclopaedia of Islam, 157.

§ 5 Qiyas or Analogy

The root meaning of the term 'Qiyas' is 'measuring' or comparing and in the language of the law it signifies a process of deduction by which the law of a text is applied to cases which though not covered by the language, are governed by the reason of the text.[39] By means of an interpretation, a text is applied to cases covered by its language, which by Qiyas, the law of the text is extended to cases not covered by its terms, though in the beginning the term was formally equated with Ijtihad, but in courses of times, their meanings differed.[40] It must be borne in mind that the following principle must be in consonance with the actual wording of the Quran and the actions or the traditions of the Prophet, in order that it be possessed of force of law.[41] An individual reasoning when directed towards achieving systematic consistency and guided by the parallel of an existing institution on decision is called Qiyas, but when it reflects the personal choice of the lawyer, guided by his idea of appropriateness, it is *Istihsan* or *Istihsab*, and the use of the individual reasoning is called Ijtehad.[42]

There is a conflict of opinion among the jurists, about the scope and validity of Qiyas as a source of the law.[43] The jurists who argue for its validity rely upon the Quranic texts, as for example one of the texts says, "There is not a beast upon the earth nor a bird that flies with both wings, but is a nation like to you : we have omitted nothing from the book ; then to their Lord shall they be gathered" VI. 38. (Palmer's transl.). Further the famous tradition of

39 Abdur Rahim, 138 on the basis of Muhammad II. 294, Tawdih, 307, Jamul Jawami, IV.3.
40 Ibid. 139; Shorter Encycl. of Islam, 138, 286.
41 Aghnides, Mohd. Theories of Finance, 87; Encycl. of Islam, S.V. Kiyas; Prof. Hafeezur Rahman, 28 etc.
42 Schacht, Origins, 96-99.
43 Wilson, 12; Abdur Rahim, 128.

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39 Abdur Rahim, 138 on the basis of Mukhtasar II. 204, Taudih, 302, Jamul Jawami, IV.1.
40 Ibid. 129; Shorter Encycl. of Islam, 158, 266.
41 Aghnides, Mohd. Theories of Finance, 67; Encyl. of Islam, S.V, Kiyas; Prof. Hafeezur Rahman, 38 etsq.
42 Schacht, Origins , 98-99.
43 Wilson, 11; Abdur Rahim, 138.

sending of Moudh to Yemen by the Prophet, is a good illustration of the doctrine of analogy.

A true Qiyas must not be opposed to a text of the Quran, nor be covered by the words of it, and must not be such as to involve a change in the law embodied in the text. The law of the text must not be such that its *raisond'etre* could be understood by human intelligence. Further the analogy must not be applied to the vocabulary of the text but to the effective cause on which it is based, it must be founded on law established by the text of the Quran, the tradition or Ijma and the law enunciated in the text to which it is sought to be applied must not have intended to confine itself to a particular set of facts.[44]

The modern researches put the views that the doctrine of Qiyas is an importation of the Rabbinical methods of legal exegesis and the term has the same origin as its Rabbinical counterpart *ha kasha*, which is a rendering into Hebrew of the Greek *symbalein*, but it is submitted that such identifications have their dangers, for other theories take other views.[45] What-else be the theory to be better inquired and analyzed by a band of scholars, for the present purposes, it can be said that in the German Civil-Code, analogy of law means the derivation of a principle from several provisions contained in codes or statutes, from a complex of such provision, which is similar to an extensive interpretation, and the judge applies a norm to the facts, although he finds that the norm does not cover the facts.[46] Similar, it is submitted may be the case of the Islamic law where a jurisconsult is to decide a point, he has to base his decision and look to the basic principle given in the Quran,

44 Abdur Rahim, 142 etsq.

45 Prof. Fitzgerald, 96; Schacht, Origins. (1950); Margoliouth, Early Developnent of Muhammedanism (1914).

46 See Standinger-Riezler, Commentary on the German Civil Code I. 34 etsq. (1936) cited by Schlesinger, 276.

the traditions and the Ijma in order to deduce the law by way of analogy.

As has been said above that some schools of the Sharia put objections against Qiyas, and so hold that it is the sole prerogative of God to legislate, while others reply that the law is only expounded by it and a law discovered by an analogy is not legislated and so no jurist plays the part of a legislator. Howeyer, it cannot be denied that Qiyas or Analogy is an important source of the Islamic legal system and has greatly helped in developing the law with keeping it in accordance to the basic and fundamental principles of Islam, and it is said that perhaps for these reasons Imam Abu Hanifa preferred it to traditions of single authority.[47] An illustration of the doctrine will show the beneficial value of it. The Quran says, "It is He who created for you all that is in the earth, then he made for the heavens and fashioned them seven heavens; and He knows all things." II. 28 (Palmer's transl.). The law is deduced from the text in the way that *Ibahat* or permissibility of use remains the normal condition of all things, or that all things are prima facie permissible unless their use is disallowed by some text or authority.

§ 6 Ijtihad and Taqlid

All the Sunni schools are unanimous in giving to *Ijtihad* an importante place in legislation, and the Shia schools give greater importance to the doctrine.[48] The word has been derived from root *Jehad*, meaning to exert onself to the utmost ability similar to a lawyer's exertion of the faculties of his mind for the formation of an opinion upon a doubtful and complex point of law.[49] While Ijtihad means the right of deducing the law from its original

47 See Mulla, Mohd Law, 27 (1955) citing Morley, Digest of Indian Cases, Intro. p. CC XXXVII; For details see Abdur Rahim, 137 etsq.

48 See Mohd. Ali, The Religion of Islam, 103.

49 Ibid. 96.

sources, *Taqlid* means the following and adoption of the actions and opinions of another person without inquiring into the reason of the person so followed.[50] The person who is followed is called *Mujtahid* and the person who follows him is callhd *Muqallid*. It is of an interest to note that the Shia schools attributing more importance to the doctrine through Imamate follow their own Imams or Mujtahid on the doctrine.

The origin of the doctriue of Taqlid was due to various circumstances, as for example, from the traditions of the Prophet, from the jurists or Imam's greatness of wisdom, and to limit the judicial discretion of a judge similar to the doctrine of judicial precedent or stare decisis of the Anglo-American Jurisprudence. Much protests have been levelled against the doctrine especially by the Sufies, some Hanbli jurists, the *Ahl-Hadith* or the followers of traditions and the modernists;[51] yet the doctrine has its weight for a layman who is not possessed of knowledge of law and religion to follow the guidance of the learned in order to base his actions upon the opinions of such noted men.[52] The question about the position of the person authorized and competent to expound the laws of the Quran, the traditions or IJma by the doctrine, it is submitted, that it is similar to jurisconsults of the Roman Law. Hence a jurist in order to qualify to act as a jurisconsult must be possessed of full knowledge of the Quran, of the traditions of the Prophet, must know the Arabic language, must have a knowledge of the basic principles of jurisprudence and legal institutions of Islam.[53]

Upon the above requirements, the law grades the

50 Shorter Encycl. of Islam. 562, Abdur Rahim, 171; Mukhtasar II. 307.

51 Ibid. 384, 563

52 Abdur Rahim, 172-173; Aghnides, 121-123; compare the legal advices given by modern attorneys and solicitors.

53 Ibid 170.

Mujtahids or jurists according to their qualifications. The first grade are called the *Mujtahid-fil-shara* or supreme jurists and under this come the four Imams of the Sunni schools, the second grade jurists are the *Mujtahid-fil-Mazhab* or jurists of a school who were the desciples of the founders of the four schools, such as Abu Yusuf, Muhammad, Zafar of Imam Hanifa's Hanafi school, Suyuti, Nawawi Ibn Salah of Imam Shafii's Shafii school, and Ibn Abdul Bar and Abu Bakr Ibnul-Arabi of Imam Malik's Maliki school. The third grade of the jurists are called the *Mujtahid-fil-Masail* or those who are competent to deduce law by own Ijtihad on subjects where the texts remain silent with the absence of any rule laid down by the jurists of the first and second rank. The fourth grade is that of *Ashab-al-Takhrij* or Masters who can draw out the real law, the fifth grade is of *Ashab-al-Tarjih* or those who have the authority to show preference, as for example the author of the Hedaya; the sixth grade is of *Ashab-al-Tashih* or those who have the authority to say whether a particular version of the law is weak or strong and the seventh or the last grade is of the *Muqaladoon*, of those who are learned men but do not claim to deduce the rule such as the author of Durr-al-Mukhtar.

In the realm of considerations of the sources of the Sharia, the interesting question may arise as to whether it is permitted to a modern qualified lawyer or jurist to be called a Mujtahid in putting own interpretations on the Sharia texts in the light of modern knowledge. One veiw holds that as the books of the Sharia are in simple and fluent languages in modern times, and their being for all ages and people, it often happens that the modern discoveries reveal the meaning of certain verses of the Quran, which could not have been appreciated by the ancient jurists.[54] Others view that the power of Ijtihad should

54 Compare the prophecy about the body of Pharoah in Quran X. 90, 91,

reside in a body of Muslim scholars having progressive knowledge and refined ideas to interpret the law according to the social engineering changes and theories of law;[55] while some others take the opposite view and remark that cases without precedent do not cease to occur, and the collection of fatwas given on such cases continue to add to the law even to the present day, yet, nevertheless the 'closure' of the gate itself is a historical fact, and as the main outlines of the law were settled in the first three centuries of the Islamic year, so no new principles have been evolved since then.[56] It can be respectfully submitted that since the Revolution in Turkey of 1922 and abolition of the caliphate, efforts have been made in nearly all Muslim countries, and in the light of Prof. Anderson's views in the articles on 'Recent Development in Sharia law', it is clear that advances have been made in Egypt, the Sudan, Syria, Iraq and others (with the Family Law Ordinance of Pakistan of 1961).[57] Further, it can be said that these modern developments reflecting traditional religious views in dealing with family and inheritance laws though adopting them in modern forms, yet in the law of obligations and especially in the areas of commercial law the developments bear an influence of the western codes [58]

92 and the discovery of the body in the beginning of the present century at Egypt. Compare also the modern fears and consequences of Nuclear Wars with Quran XCIX. 1, 2, 3, CI. 4, 5.

55 See Iqbal, The Reconstruction of Religious Thoughts In Islam, 242 etsq.

56 See Prof. Fitzgerald, 105-106; Prof. Schacht, 72 (in Law In the Middle East); compare Abdur Rahim, 191 etsq.

57 See Fyzee, 27; Prof. Anderson's article in the Muslim World XL. (1950), etc; Islamic Law In the Modern World (1959); Prof. Gibb, Modern Trends In Islam (1947), Mohammedanism ch. 10 (1955); Prof, Smith, Islam in Modern History (1959).

58 See Schlesinger, 194-195 citing Liebesny, Religious Law and Westernization in the Moslem Near East, 2 Am. J. Comp. L. 492 (1953) and its later issues; Leyser, Legal Developments in Indonesia 3

Under the circumstances it is further submitted that the doctrine may be given its due place with the balance theory of conflict of interest, for the factors of stability and factors of change of the secular policy and the religious dominating theories of Islam should not be avoided, as they are the essential factors of the life of Sharia.[59] The religion of Islam is a way of life and needs of daily life require the Hanafi saying that "the provisions of the law vary with the changes of time", and hence 'new decisions can be given with regard to new conditions', as said al-Zurqani of the Maliki school with the peculiar structure of the Sharia.[60]

§ 7 The Minor Sources

Apart from the principal sources, the Sharia recognizes certain minor sources of the law in order to level the leftovers. They are Istihsan, Istislah, Istidlal, Istishab, and Tamul.

ISTIHSAN OR JURISTIC EQUITY

Istihsan is more congenial to the Hanafi school though founded by the Maliki thought. The meaning of the term has been attributed to denote an 'equity', 'preference' or a 'favourable construction' of a rule [61] When a rule is deduced by the application of the doctrine of Qiyas to a text of the Quran or a tradition of the Prophet and seems harsh or inequitable, this doctrine is resorted to, by the jurists to adopt a rule which is fair and just. In the doctrine of Qiyas, the analogy is apparent while in Istihsan

Am. J. Comp. L. 399 (1954); Qasem, A Judl. Experiment in Libya: Unification of civil and shariat courts, 3 Int. & Comp. L.Q. 134 (1954).

59 See Prof. Saba Habachy, Islam : Factors of Stability and change. 54 Col. L. R. 710 (1954); note Ibn Khaldun's 'Social Solidarity' : see his Prolegomena, see also Issawi, An Arab Philosophy of History (1958).

60 See Prof. Fitzgeraled, 110 for the quotations.

61 Prof. Fitzgerald, 101.

it is latent and as a source of the law it remains freer and wider in scope as compared with the former.[62] As the strict adherence to analogy would deprive the law of that elasticity and adaptability which alone makes it the hand maid of justice so the principle of Istihsan was developed to be fit for comparison with the English 'Equity', developed by the Chancellor to mitigate the rigours of early common law. The basic theory of the doctrine is that a law is enacted for the benefit of mankind and so a rule inequitable on its face, and which do not serves the purposes of the law ought not to be accepted. For example, the objects of a wakf as perpetual in nature remains the general rule. Analogy, suggests that the dedication in the wakf of moveable properties in general is unlawful, but still the wakf of horses, books, and of the similars, are recognized under and through the doctrine of Istihsan.[63] Though the doctrine was greatly objected as Imam Shafii held that, 'whoever resorts to Istihsan makes laws', yet the place of the doctrine is well-settled in the Sharia of Islam, for the saying of Imam Hanifa that, "The analogy in the case points to such and such a rule, but under the circumstances I hold it for better to rule thus and thus", by its philosophical perfection, due to its theoretical origin and perfection in detail with the generation of practical workers suvived all attacks and leads one of the four Sunni schools.[64]

ISTISLAH OR MASALAHA

It is accepted by the Hanafi doctors only, and it means reconciliation, or goodwill or as Imam Ghazzali puts that it is a consideration for what is aimed at for mankind in the law, for the maintenance of religion, life, reason, descendants and property. It's key thought may

62 Abdur Rahim, 164.
63 Ham. Hedaya, 235.
64 Macdonald, 96.

be referred in the Quran itself, and its immediate counterpart is the doctrine of 'public policy' of the Anglo-American jurisprudence.[65] Though the doctrine may be attributed in origin to the Maliki school, yet it's recognition had been extended from that school to be dealt with by the other schools under different names.[66] Through this doctrine the bank interests as derived under the modern commercial and business lives had been validated for the Muslim community and the pious further suggest for the benefit of the usury to be given for charitable and similar purposes.[67]

ISTIDLAL

In its oridinary meaning it denotes the inferring of a thing from another thing, as adopted by the Hanafi jurists, while others consider it as a form of ratiocination or legal reasoning which is not covered by the doctrine of Qiyas.[68] It is said that "Qadi Udad himself says that the Hanafi doctrine of Istihsan or juristic equity, as well as the Maliki doctrine of public good are covered by Istidlal".[69] The Shafii and Maliki schools divide it into three kinds and the third kind is called Istishab.

ISTISHAB OR "THE SEEKING FOR A LINK"

It is a doctrine being a category of Istislah according to the Shafii school and means an endeavour to link up a latter set of circumstances with the earlier, on a process of settling fiqah rules by argumentation, on the assumption, that such rules applicable to certain conditions, remain valid, so long as, it is not certain that these conditions have been altered. For example, due to the long absence of a person, it becomes doubtful as to whether he is alive

65 See Quran IV. 127, VI. 86; Prof. Fitzgerald. 101.
66 See Ency. of Islam, 188; Macdonald, 87, 100, 101,
67 Mohd. Ali, 724; see Khan, Mohd. Laws against usury and How they are Evaded, 11 J. Comp L & I. L. (3rd Ser.) 233 etsq. (19291.
68 Abdur Rahim, 166; Mukhtasar II. 281.
69 Ibid. 168 citing Mukhtasar II 281.

or dead, then by this doctrine all rules must remain in force which would hold that if one knew of certain that he was still alive. [70]

TAMUL OR CUSTOM

It is a source of the Sharia having an inferior position than Ijma, but superior to a mere analogy. [71] As the centre of gravity of legal development has neither been solely in legislation, nor in juristic sciences, nor in judicial decisions, but in the society itself, through its established usages and customs, [72] similarly the place of custom in the Islamic system is considered as a kind of silent Ijma of the community, being dependent for validity upon the principles of consensus of opinion. The customs prevailng at the time of the Prophet in Arabia which were not abrogated by any Quranic text or the traditions of the Prophet, coupled with the silence of God amounted to a recognition on the point of their validities. [73] The practices and the usages of the people springing up after the death of the Prophet, were justified along with other essential conditions on the authority of the text laying down that what-else the people in general consider to be good, is so in the eye of God.[74] It is submitted that the Islamic

70 See Abdur Rahim, 166 for details.

71 Ibid. 55.

72 Friedmann , 191; see alse Dr. Jolly, Law and Custom (1928); Allen, Law In the Making (1958).

73 Abdur Rahim , 55, 136; see also S. 2. Shariat (Application) Act, 1937; Mahomed Aslam V. Khalilul Rehman 51 C. W. N. 832 (1947) : 231 I. C. 55, see also Raddul-Mukhtar III. 408.

74 Abdur Rahim 55, 136 citing Hedaya VI. 177-178; Fathul Qadir, VI. 65.

It has been said that "custom is far more important linguistic guide to statutory interpretation in France than in common law countries where the doctrine of precedent operates to emphasize case-law as the primary source of authoritative definition of kev terms:" David And Vries, The French Legal System, 107 ; for

law really takes into account the actual practices of peoples' habits and modes of living and by making the necessary changes adopts it to the changes of time, for upon a comparison of its provisions at least with the Swiss Civil Code of 1907, where it is stated that, "The code governs all questions of law which come within the letter or the spirit of any of its provision and if the code does not furnish an applicable provision,the judge shall decide in accordance with customary law, and failing that according to the rule which he would establish as a legistator ; and in this he shall be guided by approved legal doctrine and judicial tradition,"[75] it can be said that the laws and institutions of Islam have been ordained upon an especial safeguard for human nature and necessities of life.

values of a custom, see Ehrlich, Fundamental Principles of the Sociology of Law (1936) ; see also Blackstone, Commentaries. I. 63 ; Holdsworth, Hist. of English Law V. 144 etsq., VII. 345, VIII. 159 etsq.

75 A.I. cited by Schlesinger, 317-318; Compare Taudih, 307, Ayatul-Baiyanat, IV. 7, for the values of analogical deductions in the Sharia, and its sources.

IV

The Technique of Law

§ 1 Preliminary Observation

In every developed legal system, 'the law' is classified with two main general objectives. The first is the discovery of a logical structure that will enable the rules of law to be so interpreted and so effectively and concisely stated that they become more easy to grasp, apply, and develop. The second object enables the lawyers to find their law easily.[1] The jurists of the modern schools of law, classify the law according to their own principles. The philosophical school classifies it in terms of philosophy, and the historical school searches it in the various stages of development. The functional jurists approach the problem through the actual working of the legal concepts, by way of its practical application. As compared to the Anglo-American common law system, the Civil law of the Continent classifies the law into private or public law on the basis of Justinian Digest.[2] The comparaive law lawyer examines the problem through a generalized comparative analysis by organizing under it all the legal systems of the civilized world,[3] while the jurists of the analytical positivist school, snch as Holland, and others, adopted the method of classification on the basis of right by dividing it into rights in rem or personam.[4]

Though there is always a form of individuality in every legal system, and one may differ from the other in

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2 See David and Vries, The French Legal System, Pt. two Ch. I. 45 citing "Publicum jus est, quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem". D. I. 2. 1. 1. (Ulpian).

3 Paton, 208.

4 Jurisprudence, 141 (10th Ed.); see also Salmond, Jurisprudence Ch. I (11th Fd.).

such shapes, yet, it is clear, that if one analyzes the legal concepts of each system, a much advantageous means of approaching the problem is available. Thus for a proper knowlede of the legal action, one has to examine concepts which are common in every legal system. Such concepts are generally available in the fields of classification of the law according to a particular legal system, from and by its techniques, as for example through the conceptions of juristic acts, rights, and duties, upon a critical examination of the concepts relating to juristic personality and legal capacity.

The classification of the law has the main objective which is the function of law, on the basis of which and through reason, it adopts techniques in order to decide what acts are lawful, what rights and duties are recognized and what remedies could be given on particular given facts and circumstances.

In the Islamic legal system, as said elsewhere, the function of the law is to control the conscious actions of the people. It means the existence of freedom and ability of the people to do or not to do an act. As 'law' is a subject of jurisprudence, it controls such actions of a man and examines their validity in terms of its definitions, that every communication from God is law. It classifies every human act into natural and juristic, voluntary and involuntary acts, acts creating or extinguishing rights. The laws are also classified with reference to their main objectives and sources. They may be revealed laws laid down by God or unrevealed laws. Every human action is examined in such classification and the ultimate result may follow which may be compulsory, permissible, prohibted or the like.

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5 Prof. Fitzgerald, 86

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In the Islamic Jurisprudence, rights are classified into

7 Abdur Rahim, 61; 5 Cal. L. J. 29n-32n, 37n-44n, 49n-56n (1907).

Islamic legal theory in relations to the various aspects of the law and its effects are seen on the actions, rights and obligations of every individual, which divides the main body of the *Usul-al-Fiqah* or the science of jurisprudence into another category which is called *Ilmul-Faru*, which trenches the knowledge of the various branches of the law in the shapes of detailed applications.[5] So the science of jurisprudence or the Usul-al-Fiqah in Islam is concerned with the law giver or the legislator who is called *Hakim*, the objects of the law called *Mahkum-Bihi*, which are the rights, or acts, and the subjects of the law, called *Mahkum-Alaihi*, which denotes to whom the law is applicable i.e. the general mankind.[6]

§ 2 The Classification of Law.

The Islamic Jurisprudence divides the term 'law' with reference to its sources into two species. The first, are the revealed laws, which are laid down by God Himself by revelations, and the second are those which have been propounded by way of analogy from the first. The revealed laws are either of manifest revelations, i.e. the Quran, or unread revelation such as the Sunna of the Prophet. The unrevealed laws are either those deduced by *Ijtihad* or the *Ijtihad* of all jurists to be called *Ijma*, and *Qiyas*, which are deduced by one or few jurists. The law not deduced by Ijtihad are called bad laws. The Qiyas or the Ijtihad of one or of a few jurists may be *Qiyas Jali*, which are obvious or strictly logical analogy or *Qiyas Kafi* which are called Istihsan or an analogy based upon the spirit of the revealed laws, rather than on its outward form.

5 Prof. Fitzgerald, 86

6 Abdur Rahim, 48; "Fiqh, which is the Arabic equ valent for a science of law, is to translate literally the language of Imam Abu Haneefa, the knowledge of what is for a man's self and what is against a man's self', to which Sadrush Shariat adds 'in respect of his acts'....." cf Abdur Rahim in 5 Cal. L. J. 23n (1907)

The clastification of the law with reference to the objectives of law, is into defining and declaratory laws. The former defines the characteristics of an individual's act, by saying what acts are obligatory called *Fard*, prohibited or *Haram*, or permissible or *Mubah*. The latter, are those laws which generally show the component elements of the former through the certainty of a fact, event, cause or condition. For example, relationship by consanquinty is an absolute prohibition of marriage.

The Islamic jurists divide laws with regard to their purpose into religious and secular laws. The religious laws are those which appertain to the next world after death, as a form of fulfilment of the purpose of the creation of a man, and so every human being owes his duty exclusively to his Creator. Laws which relate to the worldly life of an individual are called secular laws, and if related to dealings among men are called *Muamalt*, when related to matrimonial matters are called *Munkuhat*, and, when connected to punishment are called *Uqubat*.

Similar to the English doctrine of equity developed to mitigate the rigours of the Common law, are the laws of *Rukhsat* in the Islamic legal theory, which make a concession by way of equity in the strict law called *Azimat*. For example, the strict law commands that every muslim must keep fast in a prescribed month, but the law is modified and a concession is given that in cases of sickness or journey, a fast need not be kept.[7]

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In the Islamic Jurisprudence, rights are classified into

7 Abdur Rahim, 61; 5 Cal. L. J. 29n-32n, 37n-44n, 49n-56n (1907).

rights of God and rights of men or of the people. The former comes under public law, while, the latter is of private laws. For example, punishments of crimes are rights of the general public or of the community, but a person's private claim for restitutions or compensations for losses by another person is a private right which comes under private laws. Similar is the case of the western common law, where, the essential mark of the criminal law is punishment inflicted by the state, that of delict as a redress to a wronged plaintiff,[8] though the Civilian Roman law exaggerated the law of delict more near to the penal element of the criminal law[9].

As the law of things is not considered as a separate division, but remain acts of men through right and obligation medium, so, the laws are classified with reference to the various branches of the modes of human conduct in a civilized society. The jurisprudence generally mixes up religious, moral and secular rules on the maxim that what is commanded in accordance to religion is lawful and not otherwise. For example, when the sanction for an act is only the threat of an evil to emanate from divine anger then the law is of religious nature, but if there is any sanction which the people employ in order to enforce any rule other than religious, such a law is of secular nature. Law, hence, excluded from its religious and moral rules, are classified as secular laws.

The secular laws are of many categories and are similar to the modern laws, when they deal with the general fitness of an individual to an act, discharge of his duties or his incapacity to so deal such as due to minority, lunacy, etc., in the daily worldly lives, and such laws are called personal laws. When it is related to the principles of right and

8 Paton, 373.

9 Ibid, citing Buckland and McNair,Roman Law and Common Law, 267 etsq. (1936).

wrong it is called Moral law or *Qanun-al-Fitrat S-hiha*. The agreed dealings of men in regulation inter se are called conventional, *Urf* or *Adat* Law i.e. customary law. Similarly, the international law or *As-Siyar*, and civil law or *Qanun-al-Mumlukat* deal with the general law of the state or the land. The laws governing the procedure and evidence of settlement of disputes among the general public judicially along with other connected matters are called *Adab-al-Qadi* or *Qanun-al-Shahadat* respectively.

The Islamic Jurisprudence, especially of the Hanafi school, aims that it is the purpose of the law-giver or God in enacting laws, to secure to the people, either, to avert an injury from laws or to grant positive advantage, as it is the fundamental policy of God that laws must promote the welfare of the people.[10] It is the purpose of every religious law that a man be able to descipline his soul, improve his morality, by securing the peace of mind attain spiritual welfare. The primary purpose of the secular law is the preservation of absolute necessities. Such necesssities are, life, property, lineage, reputation, understanding and religion. The secondary purposes of such laws are the removals of wants and the promotion of harmony in society, and come under the sub-topics of the laws relating to maintenance, guardianship, sale and the like.[11]

§ 3 Acts, Rights and Duties

GENERAL

In every civilized society, the value of interests fully balances the claims, demands or devices, for which the law has to make provision in the interest of individual human beings, and such values, the claims or demands of

10 Compare the Problems of a Ju isprudence of Interests (theory) elaborated by Paton, 100 etsq; see also Pound, 'The Scope and Purpose of Sociological Jurisprudence' 24 H. L. R. 591 (1911) 25 H. L. R. 140, 489 (1912); Jurisprudence (1959).

11 Abdur Rahim, 148.

such human beings fall into either in individual, public and social interests.[12] The individual interests are the claims, demands or desires in relation to the individual life, the public interests are involved in life in a politically organised society and the social interests are related to the social life of a civilized society as an assertion in title of that life.[13] In the civilized society such interest theory must be kept in view so that one individual may not violate others interests. Such interests may be called in other words, as rights which revolve upon the theory of rights and duties. Rights and duties being correlative, and one cannot have a right without a duty attached to it and a duty without a right related to it. The law lays down that certain acts and events will have particular influence on rights and duties, if any act of an individual is wrongful, it creates criminal or tortious liability, but if it is according to a prescribed method guided by law, it may create, modify, or destroy rights and duties by way of juristic acts.

ACTS

In the Islamic legal theory, the function of law is to control the actions of men in their senses. As every communication from God is law, it follows that unless the Law-giver or God has restrained a particular action of a man, the latter has an option in doing or abstaining from doing an act, and this is called an action of *Ibahat*, which may be similar to the doctrine of the Rule of Law of the Anglo-American legal system. If the law demands a man to do some-thing which is of an absolute nature, such an act when demanded is called ***Fard*** or an obligatory act, such as *Zakat* or alms-giving by the rich to the poor. If the demand is not of an absolute nature, such an act is called *Mandub* or commendable, such as, to help a

12 See Pound, Social Control through Law 68-81 (1942).

13 See Pound, A Survey of Social Interests, 53 H L. R. 1 etsq. (1943).

a man in need. If the law asks a man to refrain from doing a particular act, in an absolute form, it is called *Haram* or forbidden act, such as the drinking of wine, but if the demand in such a case is not of an absolute nature, such an act is called *Makruh* or improper as the eating the flesh of a dead animal.

Hence all human acts are generally classified into five classes according to their value in the sight of God; (1) *Fard* or *Wajib* which are expressly commanded in the Quran, in the Sunna or by an Ijma; (2) Sunna, *Masnun*, *Maudub* or *Mustahabb*-recommended or desirable; (3) *Jaiz* or *Mubah*-permitted or indifferent; (4) *Makruh* or reprobated; and (5) *Haram* or absolutely forbidden or abominable.[14] The Muslim conception of law remains very wide in this sense because, it tells not only what is required under penalty, but also what is either recommended or disliked though without reward or penalty. By such actions, an individual may seek the advice of a lawyer and of the spiritual director with regard to their relative praise-worthiness or blame-worthiness.[15]

A juristic act in the western legal systems has four elements. The first is the will of the actor directed to a particular end, the second, remains the expression of such will or the declaration of intention, thirdly, in order to make the juristic act effective, the actor is empowered by the law to act in a way to bring about the desired legal result and fourthly, the object desired must be lawful.[16] According to the Islamic legal theory, the classification of an act is into, (1) natural and juristic acts, (2) voluntary and involuntary acts, (3) acts creating rights and acts extinguishing rights. A juristic act is of

14 Prof. Fitzgerald in Law In the Middle East, 98; Macdonald, 73.

15 Macdonald, 73

16 Paton, 247-51; see Pollock, First Book of Jurisprudence Pt. I. Ch. VI (1918); see also Salmond Ss. 124, 131 (11th Ed.).

three shapes, the first is a valid juristic act called *Sahih*, which leads to the desired result, for example, a man marries a woman who is not related to him within a prohibited degree, with the required formalities, such an act is a valid act of marriage. The second is an irregular act, called *Fasid*, which remains correct in its essence, but possesses some defect in procedure, for instance, the act of marrying a woman related in the prohibited degree of relationship is an irregular act. The third juristic act is called a void or *Batil* act, where the essential condition remains missing, for example, the marriage of a man with his foster sister.

The natural act is called *Hissi* which means an act of body or mind. Voluntary acts are called *Tassarufat* or expenditure of a person's will or energy and the doer is invariably responsible for his physical or juristic act. It may be changed with the lack of intention where it becomes an involuntary act. The rights recognized by law either create rights or extinguish them. The creative acts are called *Ithbatat* and the extinguishing rights *Isqatat*. For instance, a contract of marriage creates rights in the husband and wife, while a divorce extinguishes them.

RIGHTS AND DUTIES

It has been said above that rights and duties are correlatives, and they refer to a right-duty relation as such between two persons. If A marries B as wife, then A has certain rights recognized by law from B, the wife. He has the right to have the company of his wife and the matters related to a proper house-hold life. Similarly, B, the wife, has a right to remain with her husband and to get maintenance and shelter from him. The right of A to his wife B, is related with the right of B to have maintenance, and it is the duty of the wife to remain with her husband, and similarly, it is the duty of A to care for the comforts

of his wife. [17]

In the Islamic Jurisprudence the law exercises its functions through the media of rights or *Haq* and duties or *Wujub*. A right means the authority recognized by the law to control the action of men in a particular mode against whom it exists, and the latter being obliged in obligation to act as required. [18]

The Sharia theory classifies rights into, the rights of God, called *Haquq-ul-Allah* and the rights of men called *Haquq-ul-Ebad* or rights of the people. The rights of God involve benefit to the community at large and being public rights, the law regards the observance of obligatory devotional acts which are beneficial to the general community. [19] They are enforced at the instance of the state, while a right of a private person depends upon his option.

Under the above light the Sharia classifies legal rights of an individual into the following kinds :

1. Matters relating to rights of God;
2. Right to safety of person;
3. Right of ownership;
4. Family rights which relate to marital rights, guardianship and inheritance;
5. Rights to do lawful acts;
6. Rights ex-contractu. [20]

It is to be noted that the preservation of some of these rights, also remains the duty of the state, as for instance, the *Hudd* punishments for the murderers and the robbers. So certain rights belong to the community, others belong to an individual person only, while the rest belong

17 Compare, Hohfeld, Fundamental Legal Conceptions (1923); Salmond, S. 75 (11th Ed.)

18 Abdur Rahim, 56-57.

19 Ibid. 202-203 citing Talwih, 705.

20 Compare Paton Ch. XII S. 60. p 218 etsq.; Salmond S. 76 (11th Ed).

to persons and the state both. [21]

According to Austin, there were four kinds of absolute duties owed by every person. They were; (1) duties not regarding persons but which are owed to God, (2) duties owed to persons indefinitely i. e. to the community, (3) self-regarding duties, and (4) duties owed to sovereign or the state.[22] In Islamic system, duties or obligations with reference to their origination are classified into; (1) by the implication of the law, (a) to God or the sovereign such as to say the daily prayers, or to pay taxes, (b) to individuals as those to family, namely, husband and wife relations, etc., (2) out of a person's own acts of utterance, that is, rights ex-contractu or by admitting another person's claim which are obligatory duties, and, (3) due to conducts infringing other's rights, which relate to personal safety, reputation, family rights, ownership and possession, and those related to doing lawful acts, which arise by the commission of forbidden acts [23]

A right in a person may be extinguished in many ways. It may be extinguished by performance of the duty, consent, the exercise of a power by one party without the consent of the other, impossibility of performance, frustration, the operation of law or by prescription.[24] Similarly, the declaratory laws of the Islamic legal theory may transfer and extinguish the rights and duties [25] The declaratory laws indicate the component elements of a defining law as to whether certain facts or events are the cause, conditions, or constitutes of a law.[26] They may by such causes of facts or events, extinguish a right, as for

21 Campare Kocourek, Jural Relations (2nd. Ed.).
22 Jurisprudence I. 400.
23 Abdur Rahim, 207; 5 Cal. L. J. 29n-32n, 37n-44n, 49n-56n (1907).
24 Paton, 398 citing Article 1234 of the Restatement on Contract S. 385.
25 Abdur Rahim, 210.
26 Ibid. 61.

example, the pronouncement of a *Zihar* divorce, is the cause of suspension of certain marital rights, and similarly, a foster relationship results in the absolute prohibition of a marriage. They are called *Wadi* laws and they extinguish rights of a person completely.

§ 4 The Legal Capacity

The science of the Islamic Jurisprudence or the Usul-al-Fiqah deals with subjects of the law-giver or the legislator called *Hakim*, the law or *Hukm*, the objects of the law called *Mahkum Bihi* which relate to rights, obligations, acts and the subjects of the law or *Mahkum Alaihi* to those to whom the law applies or the persons. The fitness or *Ahliat* of a person for the application of the law to his actions is called legal capacity or *Dhimma*.[27] A legal capacity is defined as the quality by which a person becomes fit for what he is entitled to, which is called in the language of the law as *Malahu* and to what he is subject to, which is called *Ma-alaih*.[28]

The person so vested with the legal capacity may be a natural person or a juristic person. For example, the sovereign state is a juristic person and an ordinary man is a natural person. But there is a doubt about the recognition of a state as a juristic or artificial person, for the jurists only recognize the right of a ruler to exercise the right of God on His behalf. It is more doubtful whether according to the earlier jurists an artificial person existed, but the later jurists seem to recognize such a person, for

27 Abdur Rahim, 217; Compare Nekum, The Personality Conception of the Legal Entity (1938).

28 Abdur Rahim 217 citing Taudih, 119; See him also in 5 Cal. L. J. 41n, 49n (1907),

Copmare Paton, 314, saying, "Hence personality may mean either in a philosophic sense the rational substratum of a human being, or in a legal sense the capacity of being a right and duty bearing unit."; Salmond S. 111 etsq. (11th Ed.).

example, they allowed a gift to be made directly to a mosque, while the earier jurists put the condition of the intervention of a trustee through whom such a gift was to be made.[29] Similarly, even it has been left doubtful as to whether a mosque is an artificial person.[30] In the Hindu and other systems, such artificial persons were given legal capacity and an idol has been regarded as a legal person in the Hindus, and even animals have been so viewed in some other systems [31]

So, the legal capacity of a natural person when seen according to the Islamic system means the rights and obligations, which remains inherent in every human being, for he has the right to inherit his relatives properties and similarly the duty of parents to maintain the minor children is inherent in the legal status of the parents. Even rights are inherent in the child in the womb, for it is capable of inheriting property from the parents, though the full legal capacity comes into existence only when a person is major and physically fit to exercise his rights and discharge his obligations, for before it, such capacity is only partial and defective.

DEFECTIVE CAPACITIES

The capacity to exercise rights and discharge obligations results from many causes or defects which are called *Awarid*. An infant has a defective capacity by reason of under-

29 Ibid. 218.

30 Masjid Shahid Ganj V. Sheromani Gurdwara Parbandhak Committee AIR 1940 P. C. 166 : 67 I.A. 251 ; see also Mt. Girraj Kunwar V. Irfan Ali A.I.R. 1952 All. 686, but see Wakf Banam Khudawand Karim V. Raj Kali 1937 ALJ 1337 ; For a recent view of absence of juristic personality of a mosque see Mohd. Shafiuddin V. Chatur Bhuj 1958 Raj. L. W. 461.

31 See Pramatha Nath Mullick V. Pradyumna Kumar Mullick 52 I.A. 245 (1925). See Duff, 3 Cam. L. J. 42 (1927); see also Keeton, Elementary Principles of Jurisprudence, 149 (2nd. Ed.); Salmond, S. 112 (11th Ed.).

standing, and the law supports the appointment of a guardian to act for his benefit. A unatic or an idiot also possesses defective capacity due to such lunacy or idiocity and so also remains the case of a person suffering from *Marzul-Maut* or death-illness.

The reason of the above rule lies in the inter-relation of the act of a person to his mind. The man is free to do a particular thing or may abstain from doing it. He has a control over his physical movements, which is exercised by his mind. When such a power of volition is in a person to do a thing, it is said that he has an intention to do it, so in such cases, the minor, the lunatic or person suffering some defects in their understanding lacks the relation of act and mind. The law safeguards their actions by holding their capacities to be defective and so they are not liable for what they do in relation to an act, for they lack in intention legally and the consent also remains vitiated in the eyes of the law.

Similarly, if a man does a juristic act with an intention and will, but he may not have the intention or the wish that it should have the given legal effect. For example, a husband in the light of mood calls his wife as mother. Here though the consent and intention is present for performing a juristic act, but he has neither consent nor he intends that it should have a legal effect of a particular divorce by comparing, yet, it may take the legal effect of divorce, though in the case of a sale, gift, such a legal effect can be avoided by proof of the real nature of the transaction.[32]

A man may intend or consent to do a thing under fraud, but such an intention or consent is vitiated by reason of fraud and is voidable at the instance of the person defrauded in relation to a transaction of a property, but again if a divorce takes place, it has a legal effect according

32 Abdur Rahim, 230; 5 Cal. L. J. 41n-44-n, 49n-56n (1907).

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The reason of the above rule lies in the inter-relation of the act of a person to his mind. The man is free to do a particular thing or may abstain from doing it. He has a control over his physical movements, which is exercised by his mind, When such a power of volition is in a person to do a thing, it is said that he has an intention to do it, so in such cases, the minor, the lunatic or person suffering some defects in their understanding lacks the relation of act and mird. The law safeguards their actions by holding their capacities to be defective and so they are not liable for what they do in relation to an act, for they lack in intention legally and the consent also remains vitiated in the eyes of the law.

Similarly, if a man does a juristic act with an intention and will, but he may not have the intention or the wish that it should have the given legal effect. For example, a husband in the light of mood calls his wife as mother. Here though the consent and intention is present for performing a juristic act, but he has neither consent nor he intends that it should have a legal effect of a particular divorce by comparing, yet, it may take the legal effect of divorce, though in the case of a sale, gift, such a legal effect can be avoided by proof of the real nature of the transaction.[32]

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to some schools of the Islamic Jurisprudence.

A person's state of forgetfulness which relates purely to the right of God, is excused, but it is not so, if it effects the right of a private person. So also, a person in sleep lacks volition and cannot divorce his wife, but if he destroys another's property, he is held liable, so too remain cases of mistake and intoxication with some divergence of opinions.

In the case of duress or coercion, the law takes into consideration the quality of coercion, but in cases of the ignorance of the law, the legal capacity of a person in not impaired. As in the modern system an ignorance of law is held to be no defence, similarly, it is the duty of every man who is physically fit, to know the law as the law is related to human nature. But, if a man does anything under mistake of fact, he is excused. As for example, the right to repudiate a marriage by option of puberty by a muslim minor girl is dependent upon her attaining the age of puberty, though she may become aware of the marriage long after she attained such an age.[33]

33 Ibid. 239. Compare the maxims *'Ignorantia juris neminem excusat* or ignorance of law is no excuse, and, *Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere* or unavoidable ignorance of fact is a good defence, D. 22. 69 pr. cited in Salmond Ss 149-150 (11th Ed.); see also Hale's Pleas of the Crown, 42, 43 etsq, for criminal liabilities; note S. 79 of the Indian Penal Code, 1860.

V

The Law of Contract

§ 1 Preliminary Observation

A contract according to the Anglo-American Common Law is an agreement for the creation and definition of rights in personam between parties and remains valid between them only.[1] The parties assume and desire for certain legal consequence, by an idea of mutual assent remaining at the root of such a contract.[2] The American Restatement defines the term as a "promise or a set of promises for the breach of which the law gives a remedy or the performance of which, it in some way recognizes a duty".[3]

In the Islamic Law, the term is defined by Articles 103-104 of the Majalla, that "the obligation and engagement of two contracting parties with reference to a particular matter. In the conclusion of the contract, both the offer and acceptance are interrelated in a legal manner, the result of which is seen in their mutual relationship".[4]

In Islam, the proper fulfillment of an obligation is a fundamental characteristic of the Sharia, and the Quran directs every Muslim for it saying, "O ye who believe: Fulfil your undertaking". V. 1. The meaning of the verse is very wide, for, it covers both the religious and secular obligations of a Muslim. In the secular field, a person makes a promise, enters into commercial or social contracts, the state enters into a treaty, all these have to be fulfilled strictly, according to the Sharia. "There are tacit obligations: living in civil society, we must respect its tacit

1 Paton, 347

2 Cheshire and Fifoot, Law of Contract, 19 (2nd Ed.).

3 On Contract.

4 Mahmasani in Law In the Middle East, 191; Compare S. 2 (e), (h) of the Indian Contract Act, 1872.

to some schools of the Islamic Jurisprudence.

A person's state of forgetfulness which relates purely to the right of God, is excused, but it is not so, if it effects the right of a private person. So also, a person in sleep lacks volition and cannot divorce his wife, but if he destroys another's property, he is held liable, so too remain cases of mistake and intoxication with some divergence of opinions.

In the case of duress or coercion, the law takes into consideration the quality of coercion, but in cases of the ignorance of the law, the legal capacity of a person in not impaired. As in the modern system an ignorance of law is held to be no defence, similarly, it is the duty of every man who is physically fit, to know the law as the law is related to human nature. But, if a man does anything under mistake of fact, he is excused. As for example, the right to repudiate a marriage by option of puberty by a muslim minor girl is dependent upon her attaining the age of puberty, though she may become aware of the marriage long after she attained such an age.[33]

33 Ibid. 239. Compare the maxims *'Ignorantia juris neminem excusat* or ignorance of law is no excuse, and, *Regula est juris quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere* or unavoidable ignorance of fact is a good defence, D. 22. 69 pr. cited in Salmond Ss 149-150 (11th Ed.); see also Hale's Pleas of the Crown, 42, 43 etsq, for criminal liabilities; note S. 79 of the Indian Penal Code, 1860.

V

The Law of Contract

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conventions, unless they are morally wrong, and in that case we must get out of such society. There are tacit obligations in the characters of host and guest, wayfarer or companion, employer or employed, etc., etc., which every man of Faith must discharge conscientiously—All these obligations are inter-connected. Truth and fidelity are parts of religion in all relations of life".[5]

It is said that the modern common law development in the law of Contract is more concerned in securing serviceable rules than in adhering closely to the logical analysis of the past, and it can no longer be said that the area of the individual self-assertion is increasing, for due to various reasons the law has seriously interfered with the liberty of Contract.[6] The Sharia theory of Contract takes into account the daily life of an individual into every spheres of the world development, it sanctions the conduct of truth and fidelity in all relations of human life, and has tried to remain in par with the intellectual and materialistic progress of mankind to adapt its institutions to the setting of laws in a changing society.[7]

§ 2 The Law of Contract

MEANING AND CONCEPTION

The corresponding term for the word 'Contract' in Arabic is called 'Aqd' which means a tie or conjunction of a proposal or *Ijab* and an acceptance or *'Qabul'*.[8] It is also a

5 A. Yusuf Ali, I. 238.

6 See Paton, 363-66.

7 Compare, Prausnitz, Standardisation of Commercial Contracts, 52 H.L.R 700 (1939); Maine said, 'The movement of the progressive societies has hither-to been a movement from status to Contract.' Ancient Law 174 (1916); Justify and note the theory in Pound, Interpretation of Legal History, 54; Graveson in 4 Mod. L.R. 261 (1941), see also Friedmann, Legal Theory, (1953); Stone, Province and Function of Law (1950), Grzybowski, From contract to status, II Seminar, 60-81 (1953),

8 Abdur Rahim, 282.

mode of acquisition of ownership by an act of one person to another, and so, it is much wider than its counterpart in the Anglo-American law.

CONSTITUTION

The essential causes of a valid contract must consist of:

1. *Faulia* or that which appurtains to the person making the contract;
2. *Maddia* or there must be a proposal and its acceptance;
3. *Suaria* or its outward manifestation must be clear;
4. *Ghayia* or some result must follow to it.[9]

Under the above constituents, for a valid and operative contract, there must be the element of consent, legal competency of the parties, a subject-matter, and a consideration or its special forms in certain cases. The jurists hold (though with disagreement), that the continuance of the purpose or consideration is a necessary and most vital element for the proper validity of a contract. Article 443 of the Majalla provides that, "If anything happens to prevent the carrying out of the primary objective in a contract (especially of service), the contract is cancelled."[10] This view is about the validity of consideration, which requires that something be done, forborne or suffered or promised to be done, forborne or suffered by the promisee in respect of the promise of the other party to the contract.[11] "The purpose in a contract must be taken into account, because it may affect its validity, invalidity, dissolution, or inviolability, and that any consideration whose object cannot be attained is not legal".[12]

A contract in order to be legal and operative, must be proposed by one party and be accepted by the other party,

9 Ibid. citing Sharhi-viqaya II. 4-5.

10 Mhamasani in Law In the Middle East, 192.

11 Anson, Law of Contract, 85.

12 Mahmasani, 195 citing Shatibi's al-Muwafaqat II. 327.

and if either of it is absent, such a contract remains inoperative and is void, In the language of the law, there is no recognised formula for offer and acceptance, which may take place by a word, an act, a gesture or by a writing. It shows the consent of the parties to a particular agreement As for example, in the case of a marriage contract which is effected by means of a declaration and consent expressed in the pretrite, such a declaratoin signified the speech which first proceeds from the other party in reply to such a declaration. As, if a woman were to say to a man, "I have married myself to you for such a sum of money", and the man where upon replies that, "I have consented", a valid contract of marriage is effected."[13]

The consent must be free from error, misrepresentation, fraud and coercion, for if either of them is present the contract can be avoided. The persons entering contract must have legal capacity to enter into it, otherwise, the contract is altogether void. The parties must not be suffering from legal disabilities, such as minority, lunacy, prodigality, indebtedeness, death-illness or marzulmaut, and drunkness. The predominent view of the Islamic Jurisprudence holds that a woman is perfectly fit to enter into a contract, irrespective of her marriage, for she possesses the full legal capacity to dispose of her property. The Maliki jurists hold that a marriage should be considered, as a partial impediment for a woman's capacity especially in cases of contracts of gifts, where the consent of the husband is essential.[14] Similarly, there is a conflict of opinion of a contract by a drunken person. The Hanafi jurists hold such a contract as valid and operative, while the Shafii school holds it not binding by reason of interference in the power of reasoning of such a person.[15]

13 Ham. Hedaya, 25-26.
14 Mahmasani, 198.
15 Ibid. citing Ibn-al-Humam; Fath-al-Qadir III. 40-42; Daud Effendi, Majme-al-Anhur II. 290.

The conditions and limitations embodied in a contract must be lawful, for if such conditions or limitations remain beneficial to only one of the parties the whole contract becomes voidable at the instance of the other party, but it is to be noted that if such a condition is in the form of an aid of the contract itself, as for example, if a seller puts a condition to deliver a particular thing to the buyer upon the payment of price. here the condition being itself a part of the transaction, the contract remains valid and enforceable.

Every contract in order to be valid must have an object which is called *Maha l-al-aqd*, which must be capable of delivery, specific, known, in existence, and permissible in law. Upon this analogy, a contract whose object is a future estate or a share in inheritance which had not fallen due is prohibited in the Sharia. As the basic idea of an alienation in the jurisprudence is the physical existence of the thing itself, so that it may be transferred from one person to another. Upon this principle in cases of voluntary transfers or dispositions, such as a gift or a wakf, the physical existence or tangibility of the thing is made a necessary condition for such a transfer and its validity. For example in a *Hiba* or gift, the delivery of possession of the thing gifted to a particular man is essential for the completion of the gift. Such delivery of possession may be direct, or, indirect, for if a house is gifted to a man, even the delivery of the key of the house is held equivalent to the delivery of possession.[16] Upon the same principle, according to the Hanafi school, the law of Musha invalidates the gift of an undivided share in a property, unless it was of an indivisible nature such as that of a small house or a small bath-room.[17] A contract of lease for future usufruct signifies a contract for a return, and the general mankind remain in need of such a contract, so it is valid even without the above condition.[18]

16 Ham. Hedaya, 482.
17 Ibid. 483; see also Fatwai-Qadi Khan IV. 174 etsq.
18 Ham. Hedaya, 489 etsq.

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CLASSIFICATION

The Sharia classifies the important types of special contracts into : [19]

1. (a), (a) An alienation or transfer of property for purposes of an exchange, which is called sale or *Bai* ; (b) if it is without exchange, it is called a simple gift or *Hiba* ; (c) by way of dedication to be called *wakf* ; and. (d) to create succession which is called a bequest or *Wasiyat*.
2. (b) An alienation of usufruct or transfer of property for purposes of (a) an exchange for other property, as a commodate loan or *Ariyt* and deposit called *Wadiyut*.
3. Contracts for ; (a) purposes of securing the discharge of an obligation to be called a pledge and suretyship and, (b) for representation called agency and partnership.
4. An alienation or transfer of marital services which is called marriage or *Nikah*.
5. An arbitration or *Tahkeem*.

BAI OR SALE

The Majalla defines a sale as "The exchange of property for property ', and in the language of the law, it signifies an exchange of property for property with mutual consent of the parties, which is completed by declaration and acceptance.[20] Owing to its comprehensive meaning in the Sharia, it includes not only a Barter, but also loan, when the articles lent are intended to be consumed and replaced to the lender by a similar quantity of the same kind of articles.[21]

19 See Abdur Rahim, 288 89.

20 Ham. Hedaya, 241; Article 105 of the Majalla; Compare Sect. 54 of the Transfer of Property Act, 1882 (India) defining a sale as, "a transfer of ownership in exchange for a price paid or promised or part-paid and part promised."

21 Baillie I. 774. Note and compare Rabel, The Haque Conference on the Unification of Sales Law, 1 Am. J. Comp. L. 58-59 (1952).

With refererence to its subject-matter, a sale is generally of four categories: (1) Bai or the sale of property for a price, which is of absolute nature; (2) Barter or *Muqaida*, where it is a form of an exchange of determinate article for another determinate article; (3) *Sarf* or a sale of price for price; and, (4) when it is made by immediate payment against future delivery.[22]

A sale, in order to be valid must possess the requisite conditions for a valid contract. The contracting parties must have an understanding and sufficient discretion, the thing sold and its price should be known to both of the parties to it, and the thing sold must be in existence and have value in law, and must be susceptible of delivery of possession either immediately or at some future period. This last condition is specific in a *Salam* sale.[23] The sale of a thing having an element of speculation is not valid, as the sale of milk in the udder of a cow is not a valid sale.[24]

A contract of sale can be revoked for various reasons. It may be revoked, if it has been so stipulated in the contract and it is called *Khayarush-shart*. So also it can be revoked upon a defect or *Khayar-ul-aib* or by fraud which causes a loss of property, which is called *Khayar-ul-taghrir*, and by common consent of the parties to be called *Iqala*.[25]

HIBA OR SIMPLE GIFT

The Islamic legal theory defines a gift as a transfer of property made immediately and without an exchange.[26] It is a form of contract and is concluded according to the

22 Abdur Rahim, 290; Mahmasani, 198; Baillie I 784.

23 Baillie I. 785-86; Mohd. Law of Sale, 2-4.

24 Abdur Rahim, 291 ; Cobb V. Rashid 3 East African L. Rep. 35.

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26 Ham. Hedaya, 482.

Majalla by an offer and acceptance and is fulfilled when the possession is taken [27] (For details see Chapter IX S. 2 Infra).

WAKF OR PIOUS DEDICATION

A wakf which mears lit. a detention is the dedication of a thing in the implied ownership of God, in such a manner that its profits may revert to or, be applied for the benefit of mankind.[28] A property becomes wakf upon a declaration by its owner permanently reserving its income for a specific purpose which may be religious, pious and charitable.[29] (For details see chapter X Infra).

WASIYAT, OR BEQUEST

A will or a bequest means the endowment of a right in property, which is to take effect on the death of the person conferring the right.[30] (For details see Chapter IX. S. 3. Infra).

IJARA OR HIRE

According to the Islamic legal theory an Ijara is a contract of usufruct for a return.[31] The Majalla defines it, as a sale of an ascertained usufruct in exchange for some ascertained thing. According to analogy, an Ijara is invalid, for the thing contracted for, namely, the usufruct is a non-entity, but such a contract is held to be valid because of the need of the people and also on the basis of traditions of the Prophet that, "Pay the hireling his wages before the sweat has dried from his brow", and further that, "If a person hire another, let him inform him of the wages he is to receive".[32]

27 Mahmasani, 199 citing Article 837 of the Majalla.
28 Ham. Hedaya, 231 ; Fatwai-Hindi X. 60.
29 Henry Cattan in Law In the Middle East, 203 etsq.
30 Ham. Hedaya, 670.
31 Ibid 489 ; compare Pollock and Wright, Possession in Common Law, 163 (1888).
32 Ibid

The hirer or the lessee is called *Ajir* or *Mawjir*, and the lessor, or the person who receives the rent is called *Moostajir*.[33] In the contract of hire the usufruct and the hire must be known particularly and specified. Such a contract is constituted by a proposal and acceptance like a sale, but unlike a sale its operation may be referred to a future date and may be made conditional subject to the options of defect and right.[34] It may consist of anything which is capable as a price, but all articles which are incapable of constituting a price, as for instance, things not of the description of similars as a cloth are nevertheless a fit recompense in hire, for they constitute a return consisting of property.[35] The property given in hire is a trust in the hands of the lessee or the bailee, who will not be responsible if it is destroyed or damaged without his fault, but the lessor can apply to the court for the cancellation of the contract.[36]

A contract of Ijara may take place in relation to leases, of bailment and for personal and professional services, and is like a loan, being incomplete until the borrower, takes the possession of it.

ARIYAT OR COMMODATE LOAN

The legal theory of Islam signifies an Ariya as an investiture for the use of a thing without a return, while the Shafii school defines it as a simple license to use the property of another [37] The person who grants the use of a thing is called *Moyeer* or the lender, the person receiving it is called *Moostajir* or the borrower, and the thing for which the use is granted is called *Areeal* or the loan.[38]

33 Ibid.
34 Abdur Rahim, 317.
35 Ham. Hedaya, 490.
36 Abdur Rahim, 317 ; De Souza V. Pe-tanji 1 Zanzibar L. Rep. 22 ; cf Prof. Fitzgerald, 186.
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The hirer or the lessee is called *Ajir* or *Mawjir*, and the lessor, or the person who receives the rent is called *Moostajir*.[33] In the contract of hire the usufruct and the hire must be known particularly and specified. Such a contract is constituted by a proposal and acceptance like a sale, but unlike a sale its operation may be referred to a future date and may be made conditional subject to the options of defect and right.[34] It may consist of anything which is capable as a price, but all articles which are incapable of constituting a price, as for instance, things not of the description of similars as a cloth are nevertheless a fit recompense in hire, for they constitute a return consisting of property.[35] The property given in hire is a trust in the hands of the lessee or the bailee, who will not be responsible if it is destroyed or damaged without his fault, but the lessor can apply to the court for the cancellation of the contract.[36]

A contract of Ijara may take place in relation to leases, of bailment and for personal and professional services, and is like a loan, being incomplete until the borrower, takes the possession of it.

ARIYAT OR COMMODATE LOAN

The legal theory of Islam signifies an Ariya as an investiture for the use of a thing without a return, while the Shafii school defines it as a simple license to use the property of another [37] The person who grants the use of a thing is called *Moyeer* or the lender, the person receiving it is called *Moostajir* or the borrower, and the thing for which the use is granted is called *Areeal* or the loan.[38]

33 Ibid.
34 Abdur Rahim, 317.
35 Ham. Hedaya, 490.
36 Abdur Rahim, 317 ; De Souza V. Pe-tanji 1 Zanzibar L. Rep 22 : cf Prof. Fitzgerald, 186.
37 Ham. Hedaya, 478.
38 Ibid.

The doctrine of Ariyat was undeveloped in the early Islamic Jurisprudence, and on the basis of certain traditions, it was accepted as being the *Tamlik* of the *Manafa* similar to hiba which was *Ain* during the times of the *Majma-ul-Unhur* and *Raddul-Muhtar*[39].

There are certain forms under which it is granted, for example, if a lender says in a deed of loan that "I have lent you this", it is a valid Ariyat as the purpose is expressly mentioned. A loan is a trust and if it is lost in the hands of the borrower without any transgression on his part, he is not held responsible for it. This is the view of Hanafi Doctors, while the Shafii jurists hold him responsible in cases where the thing is lost at a time when it is not used by him.[40] But if it is not lawful for the borrower to lent out the thing loaned, and if he does so, he is held liable in the case of loss, and it is unanimous view of all the schools inclusive of the Shia schools, or in other words, the borrower must bear the expenses of returning the thing loaned, as the loan was for his benefit.[41]

VADIYAT OR DEPOSIT

Where a person empowers another to keep his property and delivers the possession to him, such a contract is called *Wadiyat*. The proprietor of the thing is called *Modee* or the depositor, the person so empowered is *Moda* or trustee and the thing so deposited is called *Widdeeyat*, and such a contract remains terminable by either of the parties.[42] Unless the trustee transgresses with his responsibility, he is not responsible for the thing deposited for the loss or destruction, but if he gives charge of it to a stranger, he becomes liable for it, and similarly, if he mixes it

39 Kamila Tyabji, Limited Interests In Mohd Law, 40.
40 Ham. Hedaya, 481; Minhaj II. 95; Querry, Droit Musulman I. 540.
41 Ibid.
42 Ham. Hedaya, 471.

unseparably with his own property, he is held liable to pay compensation.[43]

RAHN OR PLEDGE

A pledge is a contract whereby a person assigns his property to another person, as a security for a claim.[44] It is established by a declaration and acceptance between the parties. Both movable and immovable properties can be given in a security as a pledge, but the Hanafi school differs from the Shafii and the Maliki schools and holds that an undivided share in an immovable property cannot be given as a pledge.[45]

As a pledge is a contract, the Hanafi jurists hold that it is not completed until the possession has been given to the pledgee, but the Maliki school says that such a contract is valid and binding with the concurrence of the parties, because, they relate to the property of both and are hence similar to a sale.[46] The Hanafis arguing otherwise, hold on the basis of the Quran, which expressly says that, "Give and receive pledges," and as the act of pledging is purely voluntary, it must therefore be effectively completed as a legacy which is completed by the testator dying without having receded from his bequest, so seisin is essential in the case of a pledge, for the act of the depositor in not obstructing the pawnee from taking possession of the thing pledged is equivalent to his actually investing him with the possession and is a sufficient proof of it.[47]

The pledgee has a right to retain the possession of the

43 Ibid. 472.
44 Mahmasani, 200; compare the development of a 'mortgage' in the form of a 'pledge' in the English Law: see Maitland Equity, 182 (2nd. Ed.).
45 Hedaya IX. 82-6; Abdur Rahim, 318.
46 Ham. Hedaya, 63.
47 Ibid.

pledge till the satisfaction of the debt, but he cannot use or take profit from the thing except with the permission of the pledgor or if the contract so provides for it.[48] The pledgee is responsible to any loss or damage to the pledgor, and unless there is an express contract, he cannot sell it himself to satisfy his debt but he has a priority over other creditors. The pledgor can ask the judge to have the property sold and the debt be satisfied out of the sale proceeds.[49]

A pledge may be cancelled either by an agreement of both the contracting parties or at the will of the pledgee alone, but the pledgor alone cannot cancel it.[50]

KAFALAT OR SURETYSHIP

A suretyship or bail signifies the junction of one person to another in relation to a claim. The person who renders obligatory on himself the claim of another is called a *Kafeel* or surety, the claim itself in favour of which the surety is given, whether it relates to the person or property is called *Makfool-be-hee*, the claimant is called *Makfool-be-hoo*, and the person who gives the surety is called *Makfool-an-hoo*.[51]

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48 Abdur Rahim, 319 ; Mwana Mkame 3 East African L. Rep. 48 : cf. Prof. Fitzgerald, 198.
49 Ibid.
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It is the nature of the contract of suretyship that the creditor can summon upon either the original debtor or his surety to perform the obligation, but if there occurs any diminution of the liability of the original debtor, the benefit automatically accrues to the surety, hence, if the original debtor is released or discharged from the liability, the surety is too automatically relieved, but if the concession is made in favour of the surety, the original debtor is not relieved of his liability.[54]

VAKALAT OR AGENCY

A *Vakalat* or agency is a kind of delegation by a person of his business to another to act on his behalf.[55] It is lawful for a person to appoint another person as his agent, for the settlement in his behalf of every contract which is lawful such as a sale, marriage and the like. The reason of the doctrine is said to be in the fact that an individual is sometimes prevented from acting in his own person, due to accidental circumstances such as sikness, etc., so on necessity he may appoint another person to act as an agent on his behalf.[56]

An agent can be appointed for the management of suits or criminal prosecutions, or for the payment or execution of all rights except in retaliation or punishment, and according to Imam Hanifa, a person under accusation may employ an agent to conduct his defence, but if the agent makes a confession in such a case, the prinicipal is not bound by it.[57]

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54 Abdur Rahim, 320-321 ; see also Articles 612, 618, 644, 650, 662 of the Majalla.
55 Ibid. 321
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57 Ham. Hedaya, 377.

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and the agent or the *Vakil* has to act under the authority of his principal. It is said that the Islamic system recognized the work of an agent as lawyer in court to act on behalf of the parties in disputes since early times. For such purposes skilled and qualified persons were available who were specialists in court practices, and the contract between the attorney and his client was generally drawn up according to the general rules of agency or Vakalat.[58] The agency could be terminated at the instance of the principal, and similarly the agent had a right to withdraw himself from the agency and the agency ipso facto ended; so also remained the case upon the death of either of the parties.[59]

SHIRAKAT-UL-AQD OR PARTNERSHIP

A partnership signifies the conjunction of two or more persons to carry on a business to share the profit by joint investment and it was prevalent at the time of the Prophet in Arabia.

A partnership must be divided into share of the respective partners in the profits of the business and if anyone receives a fixed remuneration, he will not be deemed a partner.[60]

It may be of two kinds. The first is called partnership by the right of property or *Shirkat-Milk*, which may be either optional or compulsive, and does not admit of either partner with respect to the share of the other.[61] The second is partnership by contract or *Shirkat-Akid*, which may be constituted by proposal and consent and the acquisition may become equally the property of all the parties.[62] Such a partnership may be of four kinds: (1) *Shirkat-Mafawizat* or partnership by reciprocity, where

58 Prof. Tyan in Law In the Middle East, 257-258.
59 Abdur Rahim, 322.
60 Ibid. 323 ; Compare Ss. 4-8 of the Indian Partnership Act, 1932.
61 Ham. Hedaya, 217.
62 Ibid.

two men, being equal of each other in point of property, privileges etc, enter into the contract of co-partnership, (2) *Shirkat-Aiman* or partnership in traffic, (3) *Shirkat-Sinnaia* or partnership in arts, and (4) *Shirkat Woodjooh* or partnership upon personal credit.[63] Partnership may be also of mixed character, where the capital and labour, agricultural fields and labour, fruits of gardens and labour are mixed. In such cases one party supplies the capital and the other the labour, or one party supplies the land for cultivatton and the other provides labour and produce of the cultivation is divided among them.[64]

The powers and liabilities of each partner remains defined in a partnership and each partner, is regarded in law to be the agent of the other, for example, each partner can sell the partnership goods for cash or credit, but no partner can lend the partnership property except with the permission of the other.[65] Upon a proper notice, given to the other partner, each partner is entitled to dissolve the partnership. It may also be dissolved by the operation of law, as by death of a partner or his becoming insane in a given case.[66]

NIKAH OR MARRIAGE : (See Chapter VI. Infra)

TAHKEEM OR ARBITRATION

As a settlement is a contract by which a dispute is settled by mutual agreement, the law adopted a method by which the disputing parties agree to settle a dispute by appointing a third person as an arbitrator called *Hakam*. Such method of resolving disputes is called *Tahkeem* or arbitration in the Islamic Jurisprudence. The arbitrator gives his award and as the disputing parties give their consent for it, they remained bound by such an award. The reason of the binding nature of the award lies in the

63 Ibid.
64 Mahmasani, 201 ; see also Articles 1404-1448 of the Majalla.
65 Abdur Rahim, 324.
66 Ibid. 325.

fact that as the disputants have powers with respect to themselves, they consequently possess a right to appoint the arbitrator among themselves, whose award being valid remains binding upon them.[67] Articles 1531, 1790 and 1841 of the Majalla say that an arbitration may be resorted to in relations to property claims, which relate to the rights of the individuals to them.

TERMINATION AND TRANSFER OF CONTRACTS

A contract is terminated by the mutual consent of the parties, or as a result of the legal principles which govern it is in general, or it may depend upon the specific nature of the contract itself. There are certain types of contracts which may be terminated by a mere declaration in clear words by one party unilaterally. Such unilateral terminable contracts are of marriage, which may be ended by a Muslim husband at any time by the pronouncement of a single formula of divorce against the wife. So also, a deposit contract can be terminated by either of the parties to it. Those contracts which cannot be terminated unilaterally can be terminated by an agreement between the parties themselves.

Duress, coercion and fraud, which are impediments or defects for a valid contract give rise to an option to one of the parties to cancel the contract. So also, some general causes terminate a valid contract, which may be by way of settlement of debt, release, and the expiration of the period of limitation.[68]

A contract is a form of obligation between the contracting parties to it, and so remains transferable A creditor who gave loan by contracting with the debtor may transfer his claim, and he may sell his claim or give away by way of gift to a person other than the debtor, and similarly, the

67 Ham. Hedaya 343 ; compare the Indian Arbitration Act, 1940.
68 Mahmasani. 201-202.

debtor may also transfer his obligation to pay the debt.[69] There is a disagreement as to the transfer by the creditor of his claim by a sale or gift to a person other than the debtor, among the Hanbali and the Shafii schools and other schools. Some Maliki jurists along with certain others accept the validity of such a transfer, while the Shafii and the Hanbali schools hold it as invalid. The Hanafi school takes a medium view upon the particular problem.[70] However, it would be of great interest to note that the Roman Law, or the Civil Law system of the Continent did not allow the transfer of a debt originally. But, it was sanctioned by all Muslim Jurisprudents and so, the researchers have established, by showing that the Islamic doctrine was carried forward to Europe, where a reception took place of the Sharia principles into the European Civil law. Its proof is furnished in the French word *Aval* itself, which was derived from the Arabic *Hawala* or the doctrine of novation of the Islamic legal theory.[71]

69 Ibid. 202.
70 Ibid.
71 Ibid. citing Huvelin, nnales de droit Commercial, 22-26 (Paris. 1901). For a general comparative study on contracts, see Eastman, Contract- A Study in Comparative Jurisprudence, 2 Nat. B.J. 201-39 (1944).

VI

The Law of Family Relations

§ 1 Preliminary Observation

The law of family relations means the basis of the relations upon which a family is governed among its members. It is a wide topic and covers the laws relating to marriage, maintenance and expenses, the law of inheritance, gifts, wakfs, wills and allied matters. For the sake of clarity, the present chapter is confined to the laws relating to marriage, dower, divorce, parentage. guardianship and maintenance, and the other relations will be discussed separately at proper places.

The central idea in the Muslim family law is the institution of marriage or *Nikah*, which means a particular contract for the purposes of legalizing generation.[1] It is an act of devotion to the Creator of the Universe, for it preserves mankind from pollution, to guard human beings from foulness and unchastity.[2] It is a contract which has for its design or object the right of enjoyment and procreation of children, being instituted for the solace of life and is one of the prime or original necessities of man.[3] In Christianity, it has a similar nature, for it has been said that. "St Augustine admirably deduces from the words of of the holy Apostle St. Paul to Timothy when he says; "The Apostle himself is therefore a witness that marriage is for the sake of generation : I wish, he says young girls to marry. And, as if some one had said to him, why ? He immediately added : To bear children, to be mothers of families".[4]

1 Abdur Rahim 326; Ham. Hedaya 125; see also Mahmud J in Abdul Qadir V. Salima 8 All. 149 (F. B.).

2 Ameer Ali, The Spirit of Islam, 247; Mohd. Law II. 269 etsq.

3 Baillie I. 4 citing Kanz and Kifayah III. 577.

4 Jacobs and Goebel, Cases and Materials on Domestic Relations, 59 (1952).

A marriage is a civil contract, it is general that the parties remain separate in their legal capacity and the western doctrine that the husband and wife are one in the eyes of law is inapplicable in the Sharia. The Badaya clearly lays down the rule that, a marriage does not give the man any right over the person of the wife except for mutual relationship according to the law of nature and not contrary to it.[5] The interests of the wife are fully protected by furnishing her full legal capacity, to own property, to enter into contracts of business and other related matters within the limits prescribed.[6] The position of the wife is treated with full equality as the Quran says in Chapter III. 195. Each individual is held responsible to one's own acts, for God, says that,"..... and they are all coming to Him on the resurrection day singly." XIX. 95 (Palmer's transl.). Each party is entitled to own and possess property in the Sharia as the Quran says that,"... ..... the men shall have a portion of what they earn, and the women a portion of what they earn ..... ". IV. 36 (Palmer's transl.).

The relationship of marriage among the parties to it has been defined by the Sharia and each party is bound to observe it. It is the theory of the law that perfect harmony

5 Ameer Ali, II. 269; compare the western Common law view that, "By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection and cover, she performs everything; and is therefore called in our law-French a *femecovert*, *femina viro cooperta*..... ..... upon this principle of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage." Cf. 1 Blackstone Commentaries, 442; see also Williams, Legal Unity of Husband and Wife, 10 M. L. B. 16 etsq. cited by Bromley, Family Law 236 etsq. (1957).

6 Compare the western authorities cited in R. V. Jackson 1 Q. B. 671 (1891) regarding restrictions of rights of a women; Pollock And Maitland, Hist. of English Law II. 409.

of family life must prevail. For this, the parties rights and duties have been defined. The position requires constant adjustments for the well-being of the future generation, and with various other reasons the law allows the voice of one partner more or less predominant over that of the other.[7] The husband has been given somewhat a controlling authority in the family for the Quran says that, "Men shall have the pre-eminence above women, because of those advantages wherein God hath caused the one of them to excel the other, and for that which they expend of their substance in maintaining their wives". V. Ch. IV (Wherrey's Transl.). The reasons of the predominance of the husband is the mental and physical superiority and according to some theorists the dower payable to wife as a consideration for the surrender within the prescribed limits of marital freedom. The idea of marriage according to Plato that, "women should be all of them wives in common of all men and that no woman should live with any man privately, and that their children, too, should be common, and the parents should not know his own offspring nor the child its parents", was a complete negation of the concept of family life. It was shattered with the accepted practice that a marriage is a form of a solemn and sanctioned pact entered into for the whole lives of the parties bounded by mutual rights and duties towards each other and towards the future off-springs.[8] The Sharia has advanced progressive views

7 Abdur Rahim, 327; compare Glanville Williams, 10 Mod. L. R. 16 (1947); In the Anglo-American Common Law, in order to preserve the unity of family, the husband and wife are regarded as one person which also reduces the wife to a subordinate position, see Paton, 131; see also Bromley, Family Law, Ch. XII (1957); note the effects and use of husband's name by the wife in the west after marriage; see Cowley V. Cowley, 1901 A. C. 450; 1 Coke 16 b.

8 See Plato, Republic, Bk. V. 457 (Lindsay transl.); Friedmann, Law in a Changing Society, 205; compare Berman, 'Soviet Family Law in the light of Russian History and Marxist theory, 56 yale L. J 26-57 (1946) where it has been said that, "The family Legislations of 1941 and 1945 indicate that the restoration of the law which is now in full swing in Soviet union, ways will be found to reconcile the Marxist, revolutionary ideals with the traditions of the Russian past", (at p. 57) which is an indispensable proof of family relations of husband and wife. Compare, Hyde V. Hyde L.R. I. P. & D. 130 (1866) for a "marrige as under-stood in Christendom".

upon the daily life by providing various methods to attain it. It encouraged the institution of marriage for the solace of life with proper virtues of women, for the Quran (III. 14) approves and compliments it. The human nature is kept under greater regards by the law, for the tradition from Abu Hurrairah runs that, "when anyone demands your daughter in marriage, whose disposition and observance of religion you are pleased with, then give her to him, but if you do not, there will be contention and strife on earth, because many women will be without husbands, and many husbands without wives, and there will be much fornication".[9] The Sharia even permits to look at a woman before marriage so that harmony and love be maintained throughout the life of the parties. The tradition says that, "Abu Hurrairah said, "A man came to the Prophet and said, 'I intend to marry a woman of the Assistants. His Highness said, 'Then look at her because in the eyes of the tribes of the Assistants there is something blue or yellow".[10]

It was the religion of Islam which raised the status of women and vested them with equal rights along with husbands (see Ch. I. S. 1 Supra). The Sharia sanctions the ways and modes of behaviours for women, and it protected their positions with the doctrine of dower or mahr, to be paid by the husband as a mark of respect for his wife. The

9 Mohd Yusuf, Mohd. Law. I 94-95 citing Mishkat-ul-Masabeeh Transl. by Mathews.

10 Ibid, 96; see also interesting arguments in 'Mussulman Woman', Transl. by Mo. Abul Kalam Azad, (Transl. from Arabic) having western citations.

tenderness of females was especially kept in view by the law, as the tradition says that the Prophet directed a caravan driver named Anjashah to slow down a little, for the camels were carrying glasses (meaning females) which were to be handled gently. The males are to behave in a civilized manner with the females as the Prophet said, "That is the most perfect Musleman whose disposition is best, and the best of you is he who behavest best to his wives".[11] The Quran prohibits any interference in the rights of women by men by directing that, "O true believers, it is not lawful for you to be heirs of women against their will, nor to hinder them from marrying others, that ye may take away part of what ye have given them in dowry, unless they have been guilty of a manifest crime"—"But converse kindly with them. And if ye hate them, it may happen that ye may hate a thing wherein God had placed much good"—"If ye be desirous to exchange a wife for another wife, and ye have already given one of them a talent, take not away anything therefrom, will ye take it by slandering her, and doing her manifest injustice"—"And how can ye take it, since the one of you hath gone in unto the other, and they have received from you a firm covenant". IV Ch. IV (Wherrey's transl)., To the same effects are the traditions of the Prophet, for example it has been reported from Abdulla-Bin Zamah that, "No one of you must whip your wife, like whipping a slave, and after that have connexion with her, in the latter part of the same day", and similarly it has been reported from Abu Hurrairah that, "A Musleman must not hate his wife; and if he be displeased with one bad quality in her, then let him be pleased with another which is good".[12]

It would be of much interest to see the provision of the Sharia regarding the practice of *Izl* (extrahere ante emissionem or an artificial birth control). Such a practice

11 Ibid. 120.
12 Ibid. 116.

according to some schools of law is not accounted as abominable with the consent of a wife, and even it is said that she can take remedies to procure abortion till there is the completion of one hundred and twenty days.[13] The reason of the rule is that the Prophet had forbidden the act of Izl with a woman without her consent, and besides the carnal connexion is the right of a free woman for the gratification of her passion, and the propagation of children, and so it is clear that a man is not at liberty to injure the right of his wife, who may have motherly instinct for a child.[14] Similar was laid in a modern case, where it was said that no doubt mere refusing to have sexual intercourse may not itself be cruelty, a husband's deliberate and in the absence of sufficient reason permanently in denying his wife having motherly instinct for a chance of the birth of an only child, is itself cruelty if injuries to her health and danger of such injury on the course of the husband continuing for sexual pleasure results.[15]

The Sharia prescribes also the duties of the wife towards her husband for it enumerates the qualities of a virtuous woman in the following tradition, "Abu-Ummah said, 'verily the Prophet said "A Musleman has not obtained (after righteousness) anything better than a good dispositioned, beautiful wife; such a wife, who when

13 Baillie I. 165; Ham. Hedaya 600; Mohd. Yusuf I. 108 (for traditions); compare the modern Western views on birth Control in Friedmann, Law In a Changing Society, 229-238.
14 Ibid.; Compare Bromley, 71, 73, 96, 150 (1957).
15 See Knott V. Knott 2 All. E.R. 305 (1955), compare Cowen V. Cowen 1946 P. 36; Baxter V Baxter 2 All. E.R. 886 (1947); Ref. Qadri, Commentaries on Dissolution of Muslim Marriages Act, 1939", (1961) at p. 58; see also Weatherley V. Weatherley 1 All. E.R. 563 (1947); for cruelty by the wife upon the husband on that ground see Forbes V. Forbes 2 All. E.R 311 (1955); For Statutory prohibitions against the sale and use of Contraceptiues in the U.S A. See Conn. Gen. State. Rev. 1958 Ss. 53-32, 54-196, upheld in Poe V. Ullman 81 S. Ct 1752 (1961)

ordered by her husband to do anything, obeys ; and if her husband looks at her, is happy ; and if her husband swears by her to do a thing, she does it to make him a swearer to the truth ; and if he is absent from her, she wishes him well, in her own person, by guarding herself from adultery, and takes care of his property". [16]

The marriage contract is a civil contract, terminable at any time, and in the worldly life it may happen where there is no alternative, but to terminate it. When it becomes unbearable to lead a life of harmony and peace according to the law, the marriage may be broken, by divorce. The basis of the law is in the Quran (see II. 229, 231).

In the pre-Islamic Arabia female partners in marriages were treated like chattels and a divorce was easy, frequent, without any reasonable or probable cause.[17] The reforms of Islam marked a new departures in the history of the Eastern legislation, for it restrained the power of divorce of husband, gave to women the right of obtaining a separation on reasonable grounds, and the Prophet prohibited its exercise without the intervention of arbiters or a judge, for it was the most detestable thing before God, out of all permitted things, for it prevented conjugal happiness and interfered with proper up-bringing of children.[18] The Quranic permission of it has to be read in the light of the lawyer's own words, when it is born in mind how intimately law and religion are connected in the jurisprudence, then it will be easy to understand the bearing of the words on the doctrine of divorce.[19]

According to a recent statistics in the United States, divorced males of a certain age have a rate of commitment

16 Mohd. Yusuf, I. 95.
17 Ency. of Islam III. 636; R Smith, 'Kinship', 83.
18 Ameer Ali, II 472.
19 Ibid; The Spirit of Islam, Ch. V.

of crimes about six times as high as either single males, and divorced females of the same age have a rate of about ten times as high as either single females or married females,[20] and it affects the children too, in commission of crimes.[21] But considering the situation of family life for the future happiness and well-being of the parties, and if anything hinders it, such a thing ought to be allowed to be put-off, for it has been said, that, "Divorce, since it disintegrates the family unity, is of course, a social evil in itself, but it is a necessary evil. It is better to wreck the future happiness of the parties by binding them to a companionship that has become odious. Membership of a family founded on antogonism can bring little profit even to the children but though divorce is unavoidable, we can at the least do our best to ensure that there is uncertainty in the status of the members of the family after the decree is absolute".[22] The Canonist doctrine of indissolubility of the marriage led to dissatisfaction of the parties to a marriage and which in turn led to the practice of obtaining a divorce by the Act of English Parliament;[23] for the question of possible reconciliation between the husband and the wife, there was the interest of the community in maintaining a perfect balance between respect for the sanctity of marriage and the social positions which make it against the public policy to insist on the maintenance of a union which had entirely broken down.[24]

20 Sutherland and Cressey, The Principles of Criminology, 186 (1960).
21 Ibid. 175; ' The basis of society, in a sense, at any rate as the conception of society visualised by the law obtained, was to see its security in the security of the home, which again depended vitally on the marriage tie not being broken or sullied lightly '' cf Tufail Ahmad V. Jamila Khatun AIR 1962 All. at p. 572,
22 Cheshire, The International Validity of Divorce, 61 L Q R. 352 (1945).
23 Cheshire, Private International Law, 336 (5th Ed.); see also the report of the Royal Commission on Marriage and Divorce, 1951-1955 (England).
24 Paton, 134 citing Blunt V. Blunt 1943 A.C. 517.

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The provisions of the Islamic laws for divorce was hence a recognition of such ideas of a progressive and peaceful family life, and though there is a great divergence among the various schools regarding the exercise of divorce by the husband unilaterally, yet it has been made legal in cases of necessity, and it is permitted only when the wife by her conduct or her words does injury to the husband or happens to lie impious, and it is *Wajib* (obligatory) when the husband cannot fulfil his duties, as when he is impotent or eunuch.[25] The law protects the wife as far as possible by imposing several conditions for divorce, for instance the husband has to pay the dower debt and incur other expenses.

The law of marriage is also related to parentage and legitimacy of the issue of it in the Islamic system, and it is the general rule to take strong presumption for the establishment of paternity. A good illustration is furnished in a tradition which is related to Abu Hurrairah, and runs that "verily an Arabi came to the Prophet and said, 'verily my wife is brought to bed a black child; and I disown it'. The Prophet said to him, 'Have you any camels? He said, 'yes'. The Prophet said, 'what colour are they'? He said they are red. His Highness said 'Is there ever a black one amongst them'? He said, 'yes'. His Highness said 'where is the black one from'. The Arabi said 'Probably its proginitors'. His Highness said, 'Perhaps this child is also from the like cause," and told the Arabi not to be displeased with the child.[26] The definition of marriage as a 'contract for the purpose of legalizing generation' proves impliedly the paternity of the man begotten the child in the wedlock.

It is an inherent principle of the Islamic law that a marriage is committed to the paternal kindered and the reations stand in same orders in points of authority to

25 Ameer Ali, II. 473 etsq citing Raddul-Mukhtar II. 683.

26 Mohd. Yusuf, I. 129: The doctrine is similar to the Anglo-American Law; See 1 Blackstone, 457.

contract minors in marriages as they do in points of inheritance,[27] with rules regarding the custody and guardin ship of person and property of minor children. Similarly the Sharia sanctions the rights of maintenance in the Quran itself (see XVII. 23, 24, 26). Further the law lays down as a duty for a muslim to maintain his wife and minor children and there are various rules regarding them being propounded by the different schools of the law.

§ 2 The Law of Marriage

NATURE AND CLASSIFICATION

As sanctioned by the Sharia, the institution of marriage legalizes the sexual relations between a man and a woman to preserve the human species, the fixation of descent, restraining men from immorality, the encouragement of morality and the promotion of love and union between the parties and mutual self-help to earn livelihood. [28] It is a form of civil contract in the eyes of law, to which the consent of the parties capable in law of contracting is essential, and being formed by declaration and acceptance expressed in a manner demonstrating an intention without any sort of ambiguit , it also creates a legal status of the married persons. [29]

The contracts of a marriage as classified by the Sunni schools, are either *Sahih* or valid, *Batil* or void, *Fasid* or irregular. A valid marriage is one which is in accordance with the law absolutely and its legal incidents are, (1) that the wife is entitled to be maintained, (2) she is entitled to dower (3) the parties are entitled to have sexual intercourse among themselves, (4) a certain degree of prohibited relationships between the parties and their relations is

27 Ham. Hedaya, 26-37; Wilson, 170

28 Taudih, 71; see also Milliot, Droit Musulman Ch. IV. p. 275 etsq.

29 Baillie II. 1; compare for its difference from other contracts in Estate of Campbell 260 Wis. 625: 51 N. W. (2nd.) 769; see Allen, Status and Capacity, 46 L. Q. R. 277 etsq.

created, (5 the issues of the parties are legitimate, and (6) the husband has a reasonable power of control over the movements and activities of the wife within the prescribed limits of the law. [30]

A batil or void contract of marriage is prohibited by the law and creates no relationship of husband and wife as the marriage with a sister, and the issues are considered as illegitimate. A fasid or irregular marriage is not inherently bad or unlawful but is one that is wanting in some of the conditions of validity, as for example the presence of witnesses. [31] Such a marriage must be avoided, though the issues are held legitimate but if the defect is removed, it may become a valid marriage [32]

In the Shia schools, there is no fasid or irregular marriage, but only valid or void marriage. The issues of a void marriage are illegitimate unless there was a semblance of right to make the issue legitimate, for instance, if a man erroneously cohabits with a strange woman, supposing her to be his wife, and she should produce a child, its parentage is established in him. [33]

THE INSTITUTION OF POLYGAMY

It is lawful in the Sharia that a muslim man may have as many wives as four at a time provided he deals with all of them with full equality and justice. [34] It is in accord with the scheme of Islamic legislation which sets up certain moral ideals to be gradually realized by the community positively forbidding as such acts which are clearly injurious

30 Baillie I. 5, 13.

31 Ibid. 150, citing Dorrool-Mookhtar, 207; however see Rashid Ahmad V. Anisa Khatun 59 I. A. 21 (1931).

32 Ibid. 156; compare Bromley, Ch. IV for distinctions between void and voidable marriages under the English law.

33 Baillie II. 93.

34 Tafsiri-Madarik, 161-2; the Mormons of America also believe in Polygamy but are prohibited by Statute.

to the social and individual life at all times. [35]

The basis of the rule is the Quranic text (see IV. 3). But it should be noted that the permission is subject to certain limitations placed upon the economic, social and other conditions of the time, for otherwise the Quran sanctions that, "If ye fear that ye cannot be equitable, then only one ..... ". It is not a religious duty that every muslim must have four wives, but it is only a safeguard against the daily abuses of family life and greater safeguard against the immoral whim by nature of men to be polygamous against women who are by nature monogamous. There are many reasons and the most important reasons for it are the physical and sexual weaknesses of females, and the economic and social conditions prevailing in the society at a particular time. The Quran as interpreted by the orthodox views, contemplates and fears about the outbreak of wars and due to it, the men population may exhaust or decrease, on the other side the question of orphans and widows may become serious. A recent example may be found in Germany after the World War II. It is for their care and welfare that the Quran sanctions polygamy as a necessity for the preservation and well-being of the human society.

But still the Quran sanctions the people having more than one wife to be equitable and just for othewise it says that, "..... if ye agree and fear to abuse your wives, God is gracious and merciful. But if they separate, God will satisfy them both of his abundance for God is extensive and wise." V. Ch. IV. 108 (Wherrey's transl.).

The modern secular view of the law, thinks that the institution is to be tolerated and even we find many muslim countries as Turkey, Tunis, Egypt, Pakistan and others, have put ceilings upon the number of wives and provided

35 Abdur Rahim, 328; see also Roberts, The Social Laws of the Koran (1925) for other recognitions of polygamy.

various conditions for it. In India it is a rare occurrence to have more than one wife and the government services are restricted against such people. Considering the conditions of women in pre-Islamic Arabia, it was the Islamic Reformation which imposed a ceiling to the unrestricted conjugal greeds of the males. It reduced the number of wives to four only by putting necessary conditions on the general muslim community.

The positions and reasons of the Prophet's wives was not like that of ordinary women or wives. His only youthful marriage was with Hadhrat Khadija who was many years elder than him and is considered as the best of women and wives due to her virtues His later marriages were governed upon two considerations. The first was compassion and clemency, as when he desired to provide for suffering widows, who could not be provided in any other way in that stage of society, and the second, was help in his duties of leadership with women who had to be instructed and kept together in the large Muslim family, where women and men had similar social rights, and all his consorts had to work and assist as Mothers of the Ummat.[36] The Quran is explicit on the point and clarifies in Ch. XXXIII. 28, 29 the whole situation plainly. The wives of the Prophet had special positions and responsibilities, in the matter of guiding and instructing women who came into the fold of Islam, for Islam is a way of life, and the Muslims are a family and so the women community has an important place, for men and their intimate instruction must be through women.[37] The reason of polygamy for the general muslims was due to the facts of the necessities of times and, "if we leave out of account that class of the people, who owing to abnormal

36 A. Yusuf Ali, The Holy Quran, Text, Transl. and Commentary, II. 1113.

37 Ibid. 1115.

conditions of society, are not generally speaking, influenced by the ideals of law and religion or by healthy public opinion, monogamy, is certainly the general rule and the exception among the Muhammadans, while polygamy is regarded by them as a safeguard, however, undesirable in itself, against greater social evils";[38] and even the modern Indian muslims consider it as a social drawback. The institution is no doubt to be amended with the growing notion of changes of society, but as law and religion is mixed in Islam which cannot be easily separated, it is submitted that it is a task for a well-equipped body of scholars to put the proposals for a change by keeping the spirit of time in mind for the sovereign legislature, for it is not an easy task to tamper with the laws and institutions of Islam, without serious repercusions. One way of doing it may be through the codifications of the Quranic and other Sharia provisions itself so as to avoid greater community reactions.

Some recent authorities accepting the incongruous situation of the English Private International Law to disregard a polygamous marriage, observe that. "If the principle of Hyde V. Hyde is that English courts must rigidly deny recognition in any form to polygamous marriages. the logical answer to the above questions will appear a little odd, if not ironical when it is remembered that polygamy is a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt, and Morocco, but also of many parts of the British Commonwealth. Moreover. the Privy Council, in hearing appeals from these places, has consistantly recognized the validity of polygamous marriages and the legitimacy of the children of second wife."[39] In England, which has older and stronger ties with

38 Abdur Rahim 340-41; Ameer Ali, The Spirit of Islam, Ch. V.

39 Cheshire, Private International Law, 294-5 (5th Ed.); Bromley, 5 etsq (1957).

various conditions for it. In India it is a rare occurrence to have more than one wife and the government services are restricted against such people. Considering the conditions of women in pre-Islamic Arabia, it was the Islamic Reformation which imposed a ceiling to the unrestricted conjugal greeds of the males. It reduced the number of wives to four only by putting necessary conditions on the general muslim community.

The positions and reasons of the Prophet's wives was not like that of ordinary women or wives. His only youthful marriage was with Hadhrat Khadija who was many years elder than him and is considered as the best of women and wives due to her virtues His later marriages were governed upon two considerations. The first was compassion and clemency, as when he desired to provide for suffering widows, who could not be provided in any other way in that stage of society, and the second, was help in his duties of leadership with women who had to be instructed and kept together in the large Muslim family, where women and men had similar social rights, and all his consorts had to work and assist as Mothers of the Ummat.[36] The Quran is explicit on the point and clarifies in Ch. XXXIII. 28, 29 the whole situation plainly. The wives of the Prophet had special positions and responsibilities, in the matter of guiding and instructing women who came into the fold of Islam, for Islam is a way of life, and the Muslims are a family and so the women community has an important place, for men and their intimate instruction must be through women.[37] The reason of polygamy for the general muslims was due to the facts of the necessities of times and, "if we leave out of account that class of the people, who owing to abnormal

36 A. Yusuf Ali, The Holy Quran, Text, Transl. and Commentary, II. 1113.

37 Ibid. 1115.

conditions of society, are not generally speaking, influenced by the ideals of law and religion or by healthy public opinion, monogamy, is certainly the general rule and the exception among the Muhammadans, while polygamy is regarded by them as a safeguard, however, undesirable in itself, against greater social evils";[38] and even the modern Indian muslims consider it as a social drawback. The institution is no doubt to be amended with the growing notion of changes of society, but as law and religion is mixed in Islam which cannot be easily separated, it is submitted that it is a task for a well-equipped body of scholars to put the proposals for a change by keeping the spirit of time in mind for the sovereign legislature, for it is not an easy task to tamper with the laws and institutions of Islam, without serious repercusions. One way of doing it may be through the codifications of the Quranic and other Sharia provisions itself so as to avoid greater community reactions.

Some recent authorities accepting the incongruous situation of the English Private International Law to disregard a polygamous marriage, observe that. "If the principle of Hyde V. Hyde is that English courts must rigidly deny recognition in any form to polygamous marriages, the logical answer to the above questions will appear a little odd, if not ironical when it is remembered that polygamy is a lawful feature not only of many foreign countries, such as Persia, Siam, Iraq, Egypt, and Morocco, but also of many parts of the British Commonwealth. Moreover, the Privy Council, in hearing appeals from these places, has consistantly recognized the validity of polygamous marriages and the legitimacy of the children of second wife."[39] In England, which has older and stronger ties with

38 Abdur Rahim 340-41; Ameer Ali, The Spirit of Islam, Ch. V.

39 Cheshire, Private International Law, 294-5 (5th Ed.); Bromley, 5 etsq (1957).

the Moslem jurisdictions, and where no statute impedes the immigration of polygamists,[40] it is said that, "to boycott polygamy would be to ignore all family relations among the great majority of the human race, treating all wives among them as mere concubines, all children as bastards and all property left by an intestate among them as escheating or becoming ownerless".[41] Though in the strict sense the English courts exclude judicial remedies for polygamous marriages, but the English Law recognized such marriages especially as to legitimacies of issues and successions to properties.[42]

Whatever be the theory and reasons of polygamy, it is agreed by all Muslim jurists that it is the duty of a husband to make every possible attempt to do justice between his wives, for the Hedaya says that, "If a man has two or more wives, it is incumbent upon him to make an equal partition of his cohabitation among them, whether he may have married them as virgins or as Siyeeba or whether some of them be of the former description, and others of the latter; because the Prophet has said, "The man who hath two wives, and who, in partition, inclines particularly to one of

40 For such Statues in America See 8 U. S. C. A. Sec. 1182 (a) (ii).

41 Cheshire, 294-95 citing Sir Dennis Fitzpatrick in Society of Comparative Legislation Jl. II. (N. S.) 379; see also Morris, The Recognition of Polygamous Marriages in English Law, 66 H. L. R. 961 (1953); compare Matter of May's Estate 305 N. Y. 486, with Dalip Singh Bir's Estate 83 Cal. Appl. 2d 256 (1948).

42 See Sinha Peerage Claim I All. E. R. 348, 349 (1946); for American views see Restatement 2d. Conflict of Laws sec. 134 (Tent. Draft. No. 4 (1957); see also some old English views in Beckett, Recognition of Polygamous Marriages in English Law, 48 L. Q. R. 341 (1942); Prof Vesey-Fitzgerald, Nachimson and Hyde Cases, 47 L. Q. R. 253 (1931 ; see also for some recent judicial views on Monogamy and Polygamy in Cheshire, Private International Law Pt. IV. Ch XI especially pages 290-8 (5th Ed.); see Risk V Risk (1951) P. 50, 53, 54; Exparte Mir Anwaruddin, 1 K. B. 634 (1917).

them, shall in the day of judgement incline to one side," (that is to say shall be paralytic).[43] The husband is bound to divide his time equally among his wives, provide equal maintenance to them. make no difference in giving gifts and distribute all his attention equally in respect of conjugal amours. But the mode of partition for the wives is left to the husband for it is said that, "If he choose, he may fix it one day of cohabitation with each of his wives, successively or more; and it is also to be remarked that by the equality of partition incumbent upon the husband is to be understood singly residence, but no coition, as the latter must depend upon the erection of the virile member, which is not a matter of option and therefore like the affections, not always in the husband's power", with some exceptions for a virgin wife for upon his failure to do so, she is entitled to have the marriage dissolved.[44] It is submitted that it is perfectly clear from the nature of the rules of the Sharia that, it is impossible for any third person to judge about the compliance by the husband of the rules of *Kissm* or justice by the husband among his wives, for the only persons knowing the truth of the facts are the wife or the husband.[45] For such amongst other reasons, in many Muslim countries the practice of polygamy has been restricted. The Islamic law as applied in Syria since 1953 has provided that it is a condition precedent for the husband desirous of marrying second wife during the life of his first wife, to show his position and income, coupled with his capacity to maintain, to the court for the grant of permission for such a second marriage.[46] The Moroccan law since 1958 has provided that

43 Ham. Hedaya 66; Baillie I. 189, II. 83-84; Mohd. Yusuf I. 116.

44 Ibid, 67; Ibid.

45 See Qadri, Commentaries on the Dissolution of Muslim Marriages Act, 1939, 67 etsq. (1961).

46 Anderson, The Syrian Law of Personal Status, The Interl. and Comp L. Q. VII (1955); Islamic Law In the Modern world, 49-50 (1959).

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46 Anderson, The Syrian Law of Personal Status, The Interl. and Comp L. Q. VII (1955); Islamic Law In the Modern world, 49-50 (1959).

if the husband is unjust between his wives he cannot enter into a second marriage and his first wife can sue him in the court.[47] The Tunisian law has completely prohibited the practice since 1957, and in the Jordan and Egypt reforms have been made.[48] In India the law empowers the wife to sue for dissolution of her marriage upon unjust treatment by the husband, and in Pakistan, the Family Law Ordinance of 1961 has copied the Middle East countries in adapting the law according to social changes, and in Aden, the law has been criticized and commented upon with a strong suggestion for improvements in the light of the Indian law.[49]

FORM AND CAPACITY

Marriage like all other civil contracts always requires declaration and acceptance for its constitution, and both must be expresed in a manner demonstrating an intention without ambiguity.[50] It is effected by the use of words 'Nikah' or marrying and *Tuzweej* or giving in marriage, and it can be contracted without any ceremony or formality, though either may be important for the evidence of the transaction.[51] The requirements of two witnesses is essential according to the Hanafi school, while the Maliki and the Shia schools do not require their presence.[52] To

47 Anderson, Reforms in Family Law in Morocco, Jl. of African Law II, 3, (1958).

48 Anderson, Islamic Law In the Modern World (1959).

49 See Knox-Mawer "Islamic Domestic law in the colony of Aden," 5 Int. & Comp. L. Q. 511 (1956); see also, Qadri, Commentaries (1961); Prof. Anderson in the Muslim World, Vols. 41, 42 (1951, 1952)

50 Baillie II. 1; under the western laws, a marriage is complete when both the parties having capacity to enter into the contract observe the necessary formalities required for its formation, see Dicey, Conflict of Laws, 758 etsq.

51 Mohd. Yusuf, II. 1; Fitzgerald, Mohd. Law, 38; Wilson, 99; Milliot, Droit Musulman, Ch. IV. 284 etsq.

52 Baillie I. 5, II. 4.

distinguish it from a mere promise, the proposal and acceptance must show an intention to establish conjugal relation from the moment of acceptance instead of from some future time, and both the proposal and acceptance must be made at one meeting and the husband must accept the offer uneqivocally.[53] It cannot be contracted by the use of the term Ijara or hire (as if a women were to say, "I have hired myself to you for so much")—nor by *Ibahit*, or permission, nor by *Illah* or rendering lawful, nor by Ariyat or loan as none of these operate as a principle of a right to a carnal conjunction; so also it cannot be contracted by the use of the term *Waseeyat* or bequest because a bequest does not convey any right of possession until after the testator's death.[54] It can be constituted by the use of words denoting a creation of immediate ownership in the substance of a thing according to the Hanafi school, for Imam Hanifa has said that whatever word has the effect of creating ownership of person (*Rukba*) if applied to the case of a female slave creates ownership of Nikah, when applied to a free woman (*Hoorra*).[55]

A marriage can be contracted through agents for the powers of the agents to bind their principals are the same as recognized in the general law of contract. The practice is called in the language of the law as *Wikalit-ba-Nikkah*.[56] But if the agent contracts a marriage of a woman with an unequal person, with a person belonging to a different town or family, the marriage is invalid.[57]

The marriage in the Islamic law depends upon the capacities of the parties to marry each other, and every Muslim of the majority age, who is of sound mind can enter into a contract of marriage.[58] The age of majority for a man

53 Wilson, 100; Ham. Hedaya, 26; Baillie I. 10.

54 Ham. Hedaya, 26 on basis of Rawayet-saheeh.

55 Mohd. Yusuf, II. 2 on authority of Qadi Khan.

56 Ham. Hedaya, 42; Wilson. 101.

57 Ibid. Baillie I, 77; Fatwai-Alamgiri III. 714.

58 Baillie I. 4.

is twelve years and for a woman it is nine years, for it is said that the parties remain *non compos mentis* or unable to understand the nature of the contract before that age. However the law requires that such marriage must be performed by lawful guardians, othewise it is capable of being repudiated at the attainment of majority by the minor through the doctrine of option of puberty or *Khiyar-ul-bulugh*.[59] The age of majority according to the Hanafi and Shia schoosl is presumed on the completion of the fifteenth year and to the Maliki school it is attained on the completion of the eighteenth year.[60]

A marriage may be proved on the basis of presumptions derived by the statement of the parties or their conduct towards each other. In America the cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a strong presumption of marriage; [61] and similarly the Soviet Code of 1927 (Article 12) provided that, the fact of marital relationship may be proved by the fact the spouses lived together, by the existence of a common household resulting from it and by the open avowal of the marital relationship in front of a third person, in personal correspondence and other documents, depending on the circumstances, by the common upbringing and education of children. [62] The English law considers the general reputation as a presumption to establish the fact of the

59 Ham. Hedaya, 36.

60 Ameer Ali, II. 535; compare Article 144 of the French Civil Code that "A man before the end of his eighteenth year, a woman before the end of her fifteenth year, cannot contract a marrige". Vide, David and Vries, The French Legal System, 99; at Canon and Common Laws the age of puberty was 14 and 12 for both a boy and a girl, and later changed in England by the Age of Marriage Act of 1949 which raised the age to the 16th year.

61 See Gall V. Gall 114 N. Y. 109 : 21 N. E. 106.

62 Schlesinger, 457.

parties being married.[63] In the Islamic law, it may be proved presumptively by the statement of the parties or their general conduct towards each other.[64] When a person has seen a man and a woman living in the same house and behaving familiarly towards each other as husband and wife, it is lawful for him to give evidence that the woman was the man's wife, [65] and so also if a man were to say 'this woman is my wife' and the woman were to say, "this man is my husband", that would amount to a marriage, by the acknowledgment of the two constituting a valid relationship according to Qadi Khan.[66] A contemporaneous acknowledgment of a child, as a legitimate child by a man and a woman has the effect of an acknowledgment of marriage.[67]

GUARDIANSHIP AND OPTION OF PUBERTY

The basis of guardianship in marriage is Quran IV, 6 and upon it the tradition says that, "There is no Nikah except by (means of) a guardian and it arises from different causes, those causes being four in number : viz., *Milkool Yameen*, *Karabut*, *Wila*, and *Imamat*".[68] A marriage is committed to the paternal kindered and the relations stand in the same order in point of authority to contract minors

63 See Taylor, Evidence: S. 578; Re Taplin 3 All. E. R. 105 (1937); Bromley, 50 etsq.

64 Amir Ali, II. 326.

65 Ibid. On basis of Fatwai-Alamgiri.

66 Ibid. Fatwai-Alamgiri, I. 727; See also Abdool Razak V. Aga Mahmed 21 I. A. 56 (1894).

67 Baillie I. 413; but see Ghazanfar V. Kaniz Fatima 37 I. A. 105 (1910) where it has been held that the cohabitation with a woman, who is a prostitute does not raise the presumption of marrige; For prohibtion of prostitution see Ghasiti V. Umrao Jan 2 Cal. 186 P. C. (1893).

68 Mohd. Yusuf, II. 87; Ruddul-Muhtar II. 484; compare the Marriage Act, 1949 Second Schedule (English); For American provision refer to Jacobs & Goebel, Cases and Materials on Domestic Relations (1961 Ed.).

in marriages as they do in the point of inheritance.[69]

All the schools are agreed that the father has the power to enter into marriages of his children without their consent until they reach the age of majority.[70] Chronogically the power of the *Wilayat-ul-ijbar* or patria potestus belongs to the father, and failing him to the father's father, and upon their failing, it belongs subject to the option of puberty, to the brothers and remoter male paternal relatives. After these it devolves upon the mother, the maternal kindered within the prohibited degrees, and upon the failure of all, it devolves upon the government.[71]

Under the Shia law, the father and the grandfather are the only persons recognized to give a minor in marriage, and the Shafii and Maliki with the Fatimi Shia schools, recognize the right of *Jabr* (imposition of the status of marriage) for females upto their marriage and emancipation from the patria potestus.[72]

In Sharia the age of puberty and majority are one and the same as they originated in the Quran (IV. 6. above). The compiler of the Hedaya has preferred the opinion of the two desciples who maintain that upon either a boy or a girl completing the fifteenth year they are to be declared adult and there is also the concurrence of the Shafii school.[73] The tradition of the Prophet says that, "Ibn-Omer said, "I was mustered before the Prophet in the year of the battle of Ohud, at which time I was fourteen years old ; and he rejected me on account of my age; after that I was mustered, in the year of the battle of ditch, when I was fifteen years old, and His Highness

69 Ham. Hedaya, 36; Wilson. 170.

70 Ameer Ali II. 234.

71 Wilson, 170; Ham. Hedaya, 36-39; Baillie I. 46; Mohd. Yusuf II. 87; Ameer Ali II. 242-3.

72 Minhaj, 321; Schacht, Origins. 183; Wilson, 407; Tyabji, Mohd. Law, S. 64; Malka Jahan V. Mohammad L. R. I. A. Supp. 192 (1873).

73 Ham. Hedaya, 529.

permitted me to go, because fifteenth year is the boundary of puberty: then Omer Bin Abdul Aziz said, 'This age separates the fighting man from the child.'' [74]

The law of guardianship for purposes of marriage is due to the necessity of a proper and suitable match, but when the minors are contracted in marriage by a person other than father or grandfather, the minors have an option either to ratify or to cancel the marriage, for the law acts for the best interest of them. [75] In order to repudiate the marriage, the decree of the judge must be obtained. In cases where the father has acted wickedly or heedlessly, the marriage remains voidable at the instance of the minor attaining majority according to the consensus of all schools. [76] The Shafii school holds that a marriage of a minor by the father to an unequal man is unlawful and the girl can exercise her option. [77] Though the Hanbali school holds a different view, yet, it is accepted that if the father was not a man of proper judgement and was of reckless character and married his daughter to an immoral man it can be set aside, and similar are views of Abu Yusuf and Muhammad. [78]

There are recognized modes of repudiation in the option of puberty, for example, when a woman perceives that her courses have come on, it would be proper to exercise her option immediately on noticing blood, as the option would stand cancelled by her mere silence in case

74 Mohd. Yusuf, I. 139; compare Wis. Stat. Ss. 245-02 245-16 (1957) U. S. A ; For the Shia view about a girl's age of majority at nine years see Nawab Sadiq Ali Khan V Jai Kishori 30 B. L. R. 1346 P. C. (1928).

75 Baillie I. 50; Ham. Hedaya, 37, 38; Sharah-Viqayah II 21; Fathul-Jalil, 8; Al-Wajiz II. 5; Mohd. Yusuf II 238.

76 Ameer Ali II, 235 on the basis of Fatwai-Alamgiri, Kitab-ul-Anwar and the Jamaaush-shittat; Wilson, 95.

77 Al-Wajiz, II. 8.

78 Abdur Rahim, 332; Prof. Abu Zahra in Law In the Middle East, 137 etsq.

of her being a virgin, or by her familiar conduct to the husband or by asking for maintenance. [79] The option can be exercised even after the consummation of the marriage, provided it was without her consent. [80]

For the proper settlement of the dispute about the exercise of the option along with its effects, the decree of the judge has been made essential, as it has been said that, "if a boy or girl should choose to be separated after arriving at puberty, but the judge has not yet made the separation when one of them dies, they have reciprocal rights of inheritance, and upto the actual separation between them by the judge, the husband may lawfully have intercourse with his wife", for such an intercourse is not zina and remains unpunished as such [81]

RULES RESTRICTIVE OF INTER-MARRIAGE

The primary basis of the authority of prohibition of marriage by degrees of relatives is the Quran IV. 25.

The three kinds of prohibited relationships of marriage are consanguinity, affinity and fosterage and they are more or less common in every civilized legal system They arise from illegitimate or legitimate relationships of blood and are called consanguinity which are same in the Sunni and the Shia schools. No marriage can be contracted, (1) with the ascendants, (2) with the descendants, (3) with the relations of the second rank, as brothers, sisters or their descendants, (4) with paternal or maternal aunts and uncles. So, is the case of prohibition in regard to a natural offspring or descendants, or father's wife or an ascendant's wife, or son's or any descendant's wife.

Affinity and fosterage prohibit marriages between a man and his wife's mother or daughter, for a woman with her husband's son by a a previous wife, as for example,

79 Baillie I. 52.
80 Baillie I. 53; Ham. Hedaya 37; Mohd. Yusuf II. 239.
81 Baillie I. 50; Wilson, 96.

for a man with his foster-sister, or for the foster-mother with her foster-child's brother. If the there is any sort of adulterous relationship, as for instance, if a man lives with a particular woman without the sanction of marriage contract, the daughter of the woman and her mother are prohibited to him. It is agreed between all the schools that contemporaneous marriages with two women if they are so related to each other that if either of them were to be a male, a marriage between them would be illegal and unlawful. [82]

It is totally prohibited for a woman to contract another marriage in the life- time of her husband, and so for a husband with a fifth wife. A divorced wife cannot marry her same husband unless after expiry of iddat or waiting, when she marries another man who divorces her. Under the Shia law, there is a perpetual prohibition to re-marry when a marriage is dissolved due to *Lian* or imprecation, while in the Sunni law, according to Abu Yusuf it is a total prohibition, while Imam Hanifa and Muhammad put a condition that if the husband acknowledges false view of the accusation, he can re-marry her. [83]

82 Baillie I. 13; II 193-203; Ham. Hedaya 28-29; Mohd. Yusuf I.18-19; Fatwai-Alamgiri, II. 385; Qadi Khan I. 380; Sharaya 263; Ameer Ali II. 276.

Compare for interesting similarities of the English law of prohibited degrees of marriages on the grounds of consanguinity or affinity as contained in the Marriage Act, 1949 First schedule; see the Marriage (Prohibited Degrees of Relationship) Act, 1931; see also Bromley, 33 etsq; Cohen, Nullity of Marriage...A study in comparative Law-Legal Reform, 64 L. Q. R. 324-40, 533-44 (1948); Sykes, The Essential validity of Marriage, 4 Int. & Comp. L. Q 159 (1955); Rheinstein, Trends in Marriage and Divorce Law of Western Countries, 18 Law & Contemp. Prob. 3-19 (1947); Walsh, Marriage and Civil Law, 23 St. John's L. R. 209 (1949), Schacht, Adultery as an Impediment of Marriage in Islamic and Canon Law, 1 Arch. d' Hist. du Droit oriential. 105 (1952); Schlesinger, 534 etsq.

83 Baillie II 29; Ham. Hedaya, 125.

In the Sharia muslim men and women cannot marry a Pagan or a non- muslim. The Quran says, "Wed not idolatresses till they believe; for lo! a believing bondwoman is better than an idolatress though she please you; and give not your daughters in marriage to idolaters till they believe, for lo ! a believing slave is better than an idolater though he please you .. — ....." II. 221. The Quran allows marriages with women of the scriptures in the following verse, "And ye are also allowed to marry free women that are believers, and also free women of those who have received the scriptures before you, when ye shall have assigned them their dower, living chastely with them, neither committing fornication, nor taking them for concubines". Sipara VI. Ch. V (Wherrey's transl.). The Shia schools prohibit even a marriage with a woman belonging to the scriptural religion, though they allow temporary marriages with them. [84]

LEGAL EFFECTS OF MARRIAGE OR THE RECIPROCAL RIGHTS AND DUTIES OF THE PARTIES

The Sharia favours harmony in the family life. It sanctions ways and modes of behaviours for the husband and wife. The duties of the husband are, (1) to maintain his wife according to his status, (2) to do justice between his wives if he has more than one wife, (3) to allow her to use her apartment and to exclude everyone except the husband, (4) to allow her to visit and be visited by her parents, blood relations within prohibited degree of relationship.[85] The wife has duties to reside in her husband's house, to allow him to sexual intercourse at reasonable times and places with due regard of decency and health, and to obey him

84 Baillie II. 29; Sharaya, 274; Ameer Ali II. 282; a Sunni and Shia can marry each other see Syed Ghulam Husain V, Mt. Setabah Begum 6 W. R 88 (1866).

85 Wilson, 129; Baillie I. 44-45; Ham. Hedaya, 140.

reasonably.[86] The wife has remedies against the husband. She can demand maintenance and sue in court for it, and demand the company of him, so also the husband can divorce her and refuse to pay maintenance if she is rebellious or *Nashizah*. [87]

The Quran favours reconciliation of differences between the parties in the following words, "And if ye fear a breach between the husband and wife, send a judge out of his family and a judge out her family: if they shall desire a reconciliation, God will cause them to agree; for God is knowing and wise". Sipara *V*. Ch. IV (Wherry's Transl.).

It is a fundamental principle of Islamic Jurisprudence that it prohibits any interference in the rights of women to their properties (see supra S. 1 Prelim. Observ.). The same provisions are also recognized in the Anglo-American Common law, the Civil and the Soviet systems, and a husband cannot interfere with the legal capacity of the wife within the limits prescribed by the law. [88] Under the Sharia the husband does not acquire any right to or control over his wife's property by the fact of marriage. Whatever property she has at the time of marriage remains absolutely her own

86 Wilson, 122; Baillie I 453; compare Bromley, Ch. VIII Consortium; note the discussions in R. V. Jackson, 1 Q. B. 671 C. A. (1891); Best V. Samuel Fox Co. Ltd. 2 All. E. R. 394 etsq. (1952); see Tunc, Husband and wife under French Law... Past, Present and Future, 104 U. Pa. L. Rev. 1064 etsq (1956); Surveyer, Husband and Wife in Louisiana and Quebec. 28 La. B. A. J. 55 etsq. (1928).

87 Wilson, 123-124; Ham. Hedaya, 73; Baillie I. 442; Kifayah II. 370; Inayah II. 299.

88 See: Wis. Stat. Ss. 246.01, 246.02, 246.06, 246.07 (1957) U. S. A ; German Civil Code: The Equal Rights Law of 1957, 7 Am. J. C. L. 313 (1958); Article 248 of the Swiss Civil Code; Article 10 of the Soviet Russian Family Code of 1927; see for a historical and legislative development, Dicey, Law and Public Opinion In England In the 19th Cent. Lect. XI; Bromley, 147, 148 etsq; Daggett, Modern Problem of the Nature of wife's Interest In Community Property ... A comparative study, 19 Calif L. R 567 etsq. (1931)

and at her disposal and she is under no disability to acquire by reason of coverture. That is to say a woman's legal capacity is in no way affected by her marriage, except as regards contracting conjugal relations with others, and if the husband tries to interfere with her legal rights over her property, he may be held liable to have his marriage dissolved. [89] After the marrige each spouse retains his or her own status and a complete freedom of conscience is guaranteed to the wife by the Muslim rules of law, and there is no mergence of her status as in the law of domicile. [93] A Muslim's Christian wife or a Sunni's Shia wife has the unfettered right to follow her own faith and practices, and if the husband rises any objection, he must be prepared to part with her. [91]

TEMPORARY MARRIAGES OR MUTAA

One of the distinguishing features of the Ithana Ashari Shia school is the recognition of temporary marriage.[92] It is not recognized by the Sunni schools, though Imam Malik considered it to be lawful, but others hold that the permission was only temporary and was abrogated.[93]

The basis of the rule is attributed to the Quranic verse (IV. 24). It is said that the verse has been repealed by the Quran later, and as it was prohibited by Caliph Umar, but the Ithana Ashari Shias recognized it.[94] The Akbari Shias also regarded it as lawful, and it is said that it flourished among the Sabeans and Zoroastrians from early times and seems to have continued by them even after their conversion to Islam in spite of the prohibition of the Prophet.[95] The practice is rare in India, Iraq and Persia, and it is equal

89 Abdur Rahim, 333; Qadri, 60 etsq.
90 Ibid ; Ameer Ali, II. 23, 459.
91 Qadri, 63-64.
92 Schacht, Origins 266; Encyl. of Islam III, 774-76.
93 Ham. Hedaya, 33.
94 Schacht, Origins. 267.
95 Ameer Ali. II. 398.

to a legalized prostitution.

The contract of mutaa is for a definite period of time otherwise it becomes a permanent marriage.[96] In the contract the period of cohabitation is fixed and some dower is specified. The period of the contract may be a day, a week, a month or so, and the dower must be in kind or cash, otherwise in the absence of a specified dower the contract is considered as void.[97]

Such a marriage may be contracted with a woman even of the Scriptural and a Parsi religion though a Shia Muslim woman cannot enter into such a contract except with one of her own sect.[98] There is no requirement of repudiation as the parties become separated on the expiration of the contracted period.

The legal incidents of a mutaa marriage are, (1) that the wife cannot claim maintenance in the absence of a contract to the contrary, (2) so is the case of inheritance, (3) the children are legitimate and inherit the parents, (4) the father is liable to maintain the issues, (5) the dower becomes payable or in absence of consummation a half is to be paid, (6) the husband can terminate the contract at will by making gift of the unexpired period of the time in favour of the wife, (7) the wife cannot release herself before the fixed period and there is no right of maintenance.[99]

As this form of marriage is for enjoyment, there is no limit and a man may enter into such contracts with any number of women.[100] On the expiry of the period of the

96 Wilson, 431; Baillie II. 42; Querry, Droit Musulman, I, 689 (Ss. 358, 693).
97 Baillie II. 42.
98 Wilson 432; Baillie II. 29, 40; Querry, I. 674.
99 Baillie II. 97, 244 344; Tyabji, S. 25; Ameer Ali II. 317, 318; Sharai-ul-Islam; see also Shoharat Singh V. Jafri Bibi 24 I.C. 499 (P. C.).
100 Sircar, Mohd. Law, II. 375.

contract and after consummation, a short period of iddat or waiting of two courses is prescribed.[101]

§ 3 The Law of Dower or Bride-price

THEORY AND DEFINITION

Dower or Mahr is an obligation imposed by the Sharia on the husband as a mark of respect for the wife.[102] The basis of the doctrine is the Quran (see IV. 3). The tradition of the Prophet too says that, "Aamir-Bin-Rabia said, "that, a woman of the tribe of Beni Fazarah married on a settlement of a pair of shoes; and the Prophet said to her, 'Are you pleased to give yourself and your property for these two shoes"! She said 'yes'. Then his Highness approved of the marriage."[103] A property of value must be assigned in a dower, for says Qadi Khan that, "Nothing can be (assigned) as dower but what is (*Mal Mootkuwin*) property which possesses value (according to law). Therefore, if property of which the species is unknown is fixed (as dower), as when a man marries a woman, for 'an animal', or 'cloth', then the woman is entitled to the proper dower, whatever might be the amount of such proper dower; because (in such a case), the dower fixed is not valid (and the dower fixed will be taken to mean as if it had not at all been fixed). And in the same way (the proper dower will be due) if he marries her for "a house (or enclosure"), without stating the position of the house (or enclosure)".[104]

A dower is defined as the property which is incumbent on the husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself, as opposed to the usufruct of the wife's person, and its

101 Ibid 381; Tyabji, S. 25 (9); for a comprehensive discussion on Muta fortified by citations of authorities see Mo. Syed Ali Naqi. Muta and Islam (2nd Ed. 1937).

102 Hidayah II. 58.

103 Mohd. Yusuf, I. 111-112.

104 Mohd. Yusuf, II. 140.

other names are *Suduk*, *Nuhlah* and *Akr*.[105] It is not the exchange or consideration given by the man to woman for entering into the contract of marriage, for such a contract in its original meaning is a conjunction and requires only the union of the parties to it and is held valid even if no dower is mentioned, but as a dower is opposed to the usufruct of the woman's person, the right to either is not completed without the other.[106] It is a safeguard against a man's arbitrary power of divorce, as it becomes binding on the husband by consummation or on valid retirement or by death.[107] The Anglo-American Common law system provides for the protection of the wife by the award of alimony out of the estate of the husband for her support and maintenauce, and for the children of the marriage. The western law also provides for the division and distribution of the estate, both real and personal from the community property for the wife.[108]

The legal minimum of dower is ten Dirhams which according to one account makes about shillings and eight pense sterling, but according to Wilson Glossory it is a silver coin 45-50 groins in weight heavier than six pence.[109] It may be stipulated at the contract of marriage for any sum however large, and the wife is entitled for the whole amount upon the consummation of marriage or the death of the husband otherwise if no consummation had taken

105 Baillie I 91; Inayah II; 52; Hamira Bibi V. Zubaida Bibi 43 I.A. 294 (1916).

106 Baillie I. 91; Kifayah II. 59.

107 Ibid. Inayah II. 55; Zakeri Begum V. Sakina Begum 9 I.A. 157, 165 (1892).

108 See Wis Stat. Ss. 47. 26-247. 31 (1957) U. S. A., see note 88 supra and also Delaume, Marital Property and American-French Conflict of Laws, 4 Am. J. Comp. L 35 etsq (1955); 2 Blackstone; Bromley, Pt. III; S. 21 of the Matrimonial Causes Act, 1950 (England); Dicey, 395.

109 Ham. Hedaya, 44.

place, to a half dower.[110] If no amount is specified she is entitled to proper dower or *Mahrul-mithl*, which is a customary dower fixed for the females of her family.

CLASSIFICATION

The dower fixed at the time of contract of Marriage is called specified dower, but when it is not so fixed it is unspecified or proper dower,[111] A specified dower may be prompt or *Murjial* and deferred or *Muwajial*.

In the Muslim recognized practice a dower is contracted in terms of deenars or dirhams. The reason of the rule has been explained by Qadi Khan that; "if a man marries a woman for a thousand dirhams current in the city (where the marriage took place) : but before the woman takes possession of the dower ; those dirhams go out of use and other sorts of dirhams come into currency: the learned lawyers have said, if those dirhams (in ref. to which the dower was fixed) are such that in case they are to be had they still circulate (or are used though at a discount then the woman shall be entitled to those dirhams and not to other dirhams, although their value has diminished in reference to gold.—But if these dirhams have cut off, and are no longer to be had or if they are to be had, but are) not in circulation among mankind, it is obligatory on the husband to pay the value of those particular dirhams just before they come into disuse. And if the dirhams are stipulated as price, the dirhams go out of use, the sale shall become invalid according to Abu Hanifa, on whom be peace.—And it is for this reason that in our times the learned lawyers have adopted, (the rule) that in dowers, the description of deenars and dirhams should be mentioned".[112]

In the specified dower the sum is fixed to which the

110 Abdur Rahim, 334: Ham. Hedaya, 44.
111 Ibid.
112 Mohd. Yusuf, II. 142.

husband has agreed to pay to the wife. The amount may be excessive or even beyond the capacity of the husband to pay. In India specifically, the muslim of middle class families stipulate a fantastic excessive amount in dower which remains perfectly beyond the capacity of the husband and even in some cases there is a lack of an intention of payment. The Oudh Laws Act has analyzed the problem along with the judicial views with regard to his standard of living and the position of the wife, yet it is a sham transaction when weighed in the balance of the law of contract, and it is submitted that such cases may be hit by the guarantee of the fundamental rights of the constitution being inconsistent, discriminatory, and so void. It is the task of the legislature to step in and bring the law, originated by the feudal lords of Northern India, back to its original purety to the rules of the Sharia.

If a father of a minor contracts to marry his ward, the law binds the minor and the dower becomes due upon him[113] If the specified dower is too small, the wife can claim to increase it in order to bring it upto the legal minimum allowed by the law.[114]

The unspecified dower is to be regulated, in its amount or value, by that of the woman's paternal relations. However, the Sharia lays down the rules for the determination of the amount of dower. It is said that, "in regulating the proper dower of a woman, attention must be paid to her quality, with the woman from whose dowers the rule is to be taken, in point of age, beauty, fortune, understanding, and virtue because it varies according to any difference in all these circumstances ; and in the like manner, it differs according to the place of residence, or time, and the learned in the law have observed that equality is also to be regarded in points of virginity, because the dowers is different

113 Mulla, Mohd. Law. S. 288.
114 Wilson, 117; Baillie I 93: Ham. Hedaya, 44

accordingly as the woman may be virgin or otherwise." [115]

The Ithna Ashari Shia School holds that when the dower is unspecified, it should not exceed at the time of fixation more than five hundred dirhems on the basis of the dower of Hadhrat Fatima, the Prophet's daughter.[116]

The specified or stipulated dower has been said to be either Muajjal or prompt and Muwajjal or deferred. The prompt dower is payable immediately on the demand of the wife after the marriage, while the deferred dower becomes payable after death or divorce.[117] If the specified dower has not been defined as prompt or deferred, a difference of opinion arose in the jurists.

The Shara Viqaya on the Hedaya, holds that in such a case the whole must be treated as prompt, while the Fatwai-Alamgiri, Durral-Mukhtar, Qadi Khan and Ruddul-Muhtar say that each case has to be decided according to own merit and the judge has to take into consideration the position of the wife, her relations, the custom of the locality, and the amount of the specified dower will fix one portion of the dower as prompt.[118] The Ithna Ashari shias hold the whole as prompt, and the Egyptian Code of the Hanafi Law, views that the deferred portion of the dower is payable after a certain interval of time, depending upon the custom of the locality, without reference to the termination of the marriage.[119]

Until the payment of the prompt dower the wife is entitled to refuse the husband to her company.[120] There is a conflict of opinion among the jurists when the marriage

115 Ham. Hedaya, 53-54; Ameer Ali, II. 437.
116 Tyabji, S. 97.
117 Ameer Ali II, 441-2; Wilson, 118.
118 Baillie I. 127.
119 Ameer Ali II. 442; Tyabji, S. 117; Fitzgerald, 66-8; Wilson, 119; Clavel, Droit Musulman I. 83, II. 278, for Indian judicial views see the text-books on Mohd. Law.
120 Baillie I. 125; Mohd. Yusuf, II. 165.

is consummated with the free consent of the wife, and still she refuses herself for non-payment of the dower. According to Imam Hanifa, she can refuse him to sexual intercourse inspite of the consummation, while the two desciples hold that unless it was during the minority of wife or insanity or against her free will, she cannot legally refuse him after consummation.[121]

INCREASE AND DECREASE

As it is an alteration of the terms of the contract in a non-essential matter within the power of the parties, and like an addition to the price in the sale, it may become incorporated with the original dower, hence the husband can at any time after the contract of marriage increase the dower payable to the wife.[122] A wife after attaining the age of majority may validly agree for the reduction or remission of it, as the Quran says, in IV. 4. As such a remission is a gift by the wife, if it is made in death-illness, its validity is suspected, and heirs of the wife may claim it.[123] But if she seeks a divorce upon any breach of the duties of the husband through court, her dower debt is not affected.[124]

WIDOW'S LIEN FOR DOWER

Under the Sharia, there is no hypothecation without seisin, and therefore a widow has no absolute lien over any specific property of her deceased husband, so as to enable her to follow it, but her claim for dower is only a debt against her husband's estate and has a priority over legacies and the rights of heirs, and her rights may be waived by her.[125] However, according to Indian judicial precedents, if she has obtained actual and lawful possession of the estate of her husband, under a claim to hold it for the dower debt, she will be entitled to retain possession until the debt is

121 Ham. Hedaya, 54; Baillie I. 125
122 Ameer Ali, II. 462; Baillie I. 111; Inayah II. 58.
123 Baillie I. 553.
124 Qadri, 94 etsq.
125 Ameer Ali, II. 450; see also Ham. Hedaya 347.

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122 Ameer Ali, II. 462; Baillie I. 111; Inayah II. 58.
123 Baillie I. 553.
124 Qadri, 94 etsq.
125 Ameer Ali, II. 450; see also Ham. Hedaya 347.

satisfied, with the usual liability for an account to the heirs.[126]

§ 4 The Law of Divorce

THEORY AND DEFINITION

A contract of marriage is a civil contract, and if it becomes impossible for the parties to abide by it, the Sharia says that it be broken off. (see sect. 1 supra). Though it is the intention of the parties that the contract must be for the life-time of the parties, yet it remains dissolveable in cases of needs, when it becomes impossible and unbearable to lead a life of harmony and peace according to the law, it is lawful to terminate it. The dissolution of a marriage except by death was strongly condemned by the Prophet as it is a worst thing being abominable, yet is valid in the eyes of the law in the interest of the wife, husband, and the children.[127] This power of termination of the marriage contract is called *Talaq*, divorce or separation. The basis of the law is in Quran II. 229, 231.

The modern civilized society recognizes the institution of divorce, though the countries such as Spain, Brazil,

126 Ameer Ali, II. 451 citing Mst. Beebee Bachun V. Sheikh Hamid Husein (1871) 10 B.L R. P.C. 45; S.C. 14 Moo. I.A. 383; Tyabji, S. 108; see however Maina Bibi V. Ch. Vakil Ahmad 52 I.A. 145 (1924) for the view that a dower debt is an unsecured debt, for it is doubted that whether the widow can transfer her right or retain the estate till the dower is paid; see also Ameeroon Nissa V. Mooradun Nissa 6 Moo. I.A. 211 (1855).

It is submitted that the position of the widow is more securely safeguarded in the Anglo-American law. The English Inheritance (Family Provision) Act, 1938 as amended by the Intestates Estates Act, 1952 seems more equitable in favour of the widow; see Bormley, 454 etsq; Oppenheim The Usufruct of the Surviving Spouse, 18 Tul. L.R. 181 etsq. (1943): Shachor Landau, Recent Development in the Law of Matrimonial Home in England and Israel, 6 Int. & Comp. L.Q. 61 etsq. (1957).

127 Raddul-Muhtar II. 682; Fath-ul Qadir II. 326; Ameer Ali, II. 472; Abdur Rahim, 336; Fitzgerald, Mohd. Law. 78.

Bolivia, Argentina, Italy and others do not recognize it. The Sharia bases the institution upon the doctrine of human nature and it is said that when the spouses develop a strong aversion to each other, and no love exists among them, the law gives them three choices. The first, is if the marriage is continued with the mutual aversion, with ill-will and rancor, it would harm the interest of the family, secondly, the physical separation of the parties by preserving the married status will give rise to the offence against morality and the parties may be derived to vices, and thirdly, the divorce, which breaks the family and makes an act of ill-will out of what had originally been an act of blessing, will be the most sound choice even though it may destroy the family life.[128] Further in addition to the interests of the parties on the question of possible reconciliation between them, there also remains the interest of the community which maintains a balance between the sanctity of marriage and the social welfare for public policy.[129] The Sharia takes into consideration by balancing the interests of the individual and society and regulates the institution with a unique method which though possessed of qualities, may have some drawbacks and difficulties also.

A talaq or divorce according to dictionary meanings is the taking off any tie or restraints while the legal theory

128 Prof. Abu Zahra in Law In the Middle East. 146.

129 Paton, 134; compare Simon L. C's view in Blunt V. Blunt 1943 A.C. 517; see also Fender V. Mild-may 1938 A.C. 1 Note the exhaustive and critical analysis and discussions in the reports of the English Royal Commission on Marriage and Divorce, 1951-1955; see for a critical appraisal of the report in Kahn-Freund, Divorce Law Reform? in 19 M.L R. 573; Stone, The Royal Commission on Marriage and Divorce: Family Dependants and their Maintenance, 19 M.L.R 601; Bromley, 82 etsq.: compare Abdel, Dissolution of Marriage in Islamic Law; 3 Islamic Q. 165 etsq, 215 etsq (1957), with Rheinstein, The Law of Divorce and the Problem of Marriage Stability, 9 Vand. L.R. 633 etsq. (1956).

of Islam explains it as the taking off the marriage tie by the prescribed and fixed formulas and methods.[130] The term used in two senses, the one is that which comprehends the other. That is to say in the more comprehensive sense, it is the title of a *Kitab* or book which comprises all the separations of a wife from her husband for causes originating in him, and in the less comprehensive sense, it is restricted to that kind of separation or release from the marriage tie which is effected by the use of certain appropriate words by the husband, and to distinguish the two senses in which the term is employed it renders the more comprehensive sense by the word 'Divorce' and the more restricted sense by the word 'Repudiation', though some times it becomes obliging to use the former words in its common acceptance of any dissolution of the marriage tie.[131]

CLASSIFICATION

According to ancient authorities and early jurists of the west, a contract of marriage was dissolved either by the authority of the husband himself or by mutual consent, or by the order of the court upon approach of either of the parties.[132] The religion of Islam reformed the pre-Islamic Arabian customs of divorces by the males and so it raised the status of the females. It created a balance for the proper social and family justice of the time.

In the Sharia there are thirteen different kinds of divorce or separation called *Firkut* of married parties. Seven of such kinds require a judicial decree while the rest do not so require The former are separations for *Jub* and impotence and separations under the option of puberty, for inequality, unsufficient dower, husband's refusal of Islam or due to ipmrecation or Lian. The latter are

130 Inayah II. 211; Baillie I. 203 citing Ashbaho-wal Nazair; Encyl of Islam S.V. Talak sect. IV.

131 Baillie I. 204.

132 See, E. Neufeld, Ancient Hebrew Marriage Law, 180 (1944).

separations under the option of emancipation, for *Eela*, apostacy or difference of *Dar*, by reason of property or a marriage remaining invalid.[133] Every separation of a wife from her husband for a cause not originating from the husband, as for example, the option of puberty is a cancellation of the marriage contract; while if the cause originates in the husband as for example on impotency or upon his will it is called *Talak*.[134]

However, the simple method classifies the dissolution of a marriage into:

(*A*) The dissolution upon the exercise of the option of puberty.

(*B*) The dissolution upon the unilateral act of the husband.

(*C*) The dissolution by the mutual consent or agreement of the parties to the marriage.

(*D*) Judicial dissolution at the instance of the wife herself.

(*E*) Automatic dissolution or dissolution by operationof law.

(A) DISSOLUTION BY OPTION OF PUBERTY *(see S. 2 supra)*.

(B) DISSOLUTION BY UNILATERAL ACT OF HUSBAND

A Muslim husband of understanding may repudiate his marriage contract with his wife at any time. This is called Talaq which means the removal of all the restraints

133 Baillie I. 203.

134 Schacht, Origins. 195 etsq.

Compare the western historical classification of divorce a *mensa et thoro* (divorce without severing the marriage tie). and divorce a *vinculo matrimonii* (divorce by the Act of Parliament); see Bromley, 80. etsq.; for modern Law; see the Matrimonial Causes Act, 1950 (English); for Hindu Law, see the Hindu Marriage Act, 1955 (which is more or less a copy of the English Law); for American Law, see Jacobs and Goebel, (1961 Ed.); for Communist Laws see Wolff, Some Aspects ofMarriage and Divorce Laws in Soviet Russia, 12 M.L.R, 290 etsq. (1949); for Civil Law, see Simon, Divorce in French Law, 57 Jurid. Rev. 286 etsq. (1932).

of marriage contract. Its pillars are the expressions, such as, "Thou art repudiated" and it requires two conditions for validity. The first is that there must be an actual tie on the woman either of marriage or Iddut, and secondly, she must still be legally capable of being the subject of the marriage.[135] A divorce may be pronounced oral or by writing. The Shia schools hold for oral divorce unless the husband is excused physically, and its Ithna Ashari sect holds further for a strict adherence to a certain form.[136] Even a divorce can be pronounced in the absence of the wife or witnesses and the power to divorce can be delegated.[137] An insance and minor cannot pronounce an effective divorce, though a person suffering from Marzul-maut can effectively divorce his wife.[138]

The jurists differ on a divorce under compulsion. The Hanafi school holds it effective, the Shias hold even a divorce under intoxication as invalid while the Maliki and Shafii schools do not recognize it.[139]

There are two modes of a talaq[140] The first is called *Talaq-soona* or a divorce in the approved form in conformity with the methods approved by the Sharia. It may be *Ahsan* or best and *Husun* or good. The second is called *Budee* or irregular form of divorce which is held valid but sinful. It is also divided into two kinds with reference to number of pronouncements in time. The Shia schools do not recognize a Budee form of divorce, but only recognize the Ahsan form.

A divorce may be pronounced either in a revocable form called *Rajai* or in an irrevocable form called *Bain*

135 Baillie I. 205 etsq.
136 Ibid. II. 107; Tyabji, S. 120 A.
137 Ibid. I. 242; Ham. Hedaya 87; Amir Ali II. 486; Fatwae-Usmani 134.
138 Amir Ali II. 478; Mohd. Yusuf I. 124; Ham. Hedaya 100.
139 Ham Hedaya 75; Ameer Ali II. 481; Fathul Qadir III. 344.
140 Ham. Hedaya 72; Baillie I. 205.

which is a complete divorce. The reason of difference of revocability is the possibility of reconciliation of the spouses. As the law requires three pronouncements of a divorce, upon its happening, the husband cannot marry the wife again until she marries another man who having consummated the marriage divorces her or dies and her iddut expires, for the Quran says that, "If he divorced her, she is not after that lawful to him (that is after a third divorce) until she marry another husband."[141]

(C) DISSOLUTION BY MUTUAL CONSENT

The basis of the law is the Quran which says, "And if ye fear that they cannot observe the ordinance of God it shall be no crime in either of the them on account of that for which the wife shall redeem herself." Sipara II. Ch. II (Wherrey's transl.). Such a divorce may be of two kinds. The first is called *Khula* which means the laying down by a husband of his right over his wife, for an exchange from her as a form of compensation for giving her the release[142] The second is called *Mubarat* which is a mutual release of the parties without any claim upon each other.[143]

The jurists differ upon the doctrine of consideration in a mutual divorce. The Egyptian Code of the Hanafi Law holds in a Khula, no requirement of payment by the wife.[144] The Imam Azam or Abu Hanifa holds that in the absence of any agreement the dower is released in both the cases, while Abu Yusuf says that the dower is not relinquished in Khula and in Mubarat both. Mohammad holds that the dower is not released in any way,[145]

141 Ham. Hedaya, 108; Baillie I. 205; for a tradition of the Prophet narrated by Imam Muslim on the authority of Ibn Abbas that during the period of the Prophet three divorces were counted as one divorce only, see, Abdus Salam Nadvi, 120-121.
142 Amir Ali II. 506; Kifayah II. 278; Doorul-Mookhtar 256; Baillie I. 305: Ham. Hedaya 112.
143 Ibid.
144 Abdur Rahman, Institutes of Mussalman Law, 159.
145 Ham Hedaya 116: Baillie I. 305-8: Tyabji S. 167.

Similarly the jurists further disagree upon the jurisdiction of a court of law to grant a divorce by mutual consent. The Hanafi, Shafii, Hanbli, and the Shia schools hold absence of jurisdiction, the Maliki school on the basis of the Quranic verse and traditions holds in favour of the jurisdiction of the court, while the Ahmadiyya sect holds the jurisdiction upon the approach of the wife. [146]

(D) JUDICIAL DISSOLUTION

1. IMPOTENCY

In the Sharia an impotent person is one who cannot have connexion with a woman though he has the natural organs, and a person who is able to have connection with an enjoyed woman; but not with a virgin or with some women but not with others, whether the disability be by reason of disease, or weakness of original constitution, or advanced age or enchantment, is still to be accounted impotent with respect to her with whom he cannot have connection. [147]

In such cases, the wife should bring the matter to the judge demanding separation on that ground. The judge is to ask the husband about the intercourse and if he admits the case is to be adjourned for a year, but if he denies, the judge is to swear him and upon it the right of the wife will be held void But if he refuses to swear, an inspection has to be made by two women and the relief is to be granted or refused accordingly. [148]

The reason of the fixation of time has been made due to the nature and causes of the diseases on basis of excess

146 Bukhai, 68, 11: Mohd. Ali, The Religion of Islam 676.

147 Baillie I. 347; compare the similar western views in Bishop, Law of Marriage and Divorce Ch. XIX; see also Bromley, Chapters, V to X: Tolstoy, Law and Practice of Divorce and Matrimonial Causes (1946); note the interesting discussion of impotency in S.V.S. 3 All. E. R. 736 etsq. (1954) and compare it with the Islamic provisions.

148 Raddul-Muhtar II. 979; Fatwai Qadi Khan on Talakul-Inin; Fatwai-Alamgiri I 700; see the Dissolution of Muslim Marriages Act, 1939 (India).

of heat, cold, dryness, but if after the year, the infirmity continues the husband has to be separated. [149] Similarly is the case of a man whose male organ has been cut off or *Mujboob*. [150] If the wife also suffers from absence of passage, the law permits no separation. [151]

2. ZIHAR OR COMPARING

When the husband says to his wife that "Thou are to me as the back of my mother", it is *Zihar*. The basis of it is in the Quran (LVIII.2). The effect of Zihar is to illegalize matrimonial intercourse till an expiation has been made, otherwise in the case of his refusal to do so, the court will grant a decree dissolving the marriage according to the Hanafi view. The Shia views are that the judge cannot grant a decree on non-expiation. [152]

3. LIAN OR IMPRECATION

By *Lian* the wife is entitled to bring a suit for divorce for the husband's false charge of adultery on her. In the Sharia, a Lian means testimonies confirmed by both sides, referring to a course on the part of the man, which is a substitute for the specific punishment for scandal and for wrath on the part of the woman, which is a substitute for a specific punishment of adultery. [153] The Quran prescribes the mode of settlement clearly in XXIV. 4-9, and if the husband is unable to prove his allegation, the wife can sue for a judicial divorce. The paternity of

149 Ham. Hedaya, 126-7.

150 Amir Ali, II. 532; Mohd. Yusuf, II. 230; see also Harthan V. Harthan 2 All. E. R. 639 (1948) for the English Law.

151 Mohd. Yusuf, II. 232.

152 Ham Hedaya 119; Baillie I. 325; Amir Ali II. 457.

153 Kifayah II. 316; note the interesting legal views on the artificial insemination and whether it constitutes adultery according to the English Law in Bromley, 59, 88, 262 citing Tallin, Artificial Insemination, 34 Can. Bar. R. I., 166.

Similarly the jurists further disagree upon the jurisdiction of a court of law to grant a divorce by mutual consent. The Hanafi, Shafii, Hanbli, and the Shia schools hold absence of jurisdiction, the Maliki school on the basis of the Quranic verse and traditions holds in favour of the jurisdiction of the court, while the Ahmadiyya sect holds the jurisdiction upon the approach of the wife. [146]

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of the child is also decided by the procedure before the court. [154]

4. EELA OR SWEARING

Eela means swearing, and it signifies a husband's prohibition of himself from approaching his wife for four months by means of vow of abstention, and upon the completion of the time, the divorce is complete and the marriage ends according to the Hanafi school, while the Ithna Ashari Shia and the Shafii schools require a judicial proceeding of it. [155] The basis of the law is the Quran (II.226-27). The husband is bound to expiate on breaking his vow.

5. FAILURE TO MAINTAIN

The Sharia prescribes as a duty of the husband to maintain his wife, but a conflict arises of making the failure to maintain as a ground of divorce. According to the Shafii school, the wife can sue for divorce in the court. [156] The Hanafi school did not recognize the poverty of husband as a ground for divorce, though a Hanafi judge may send the case to a Shafii judge. [157] The Maliki and Hanbli schools provide for conditions and procedure of three days respite to the husband before the marriage is dissolved on the ground of his incapacity to maintain. [158] However, the wife in order to be entitled for maintenance must perform her duties prescribed by the law. [159]

6. POWER OF DELEGATION

At the contract, the parties may enter into conditions

154 Baillie I. 338; Ham. Hedaya, 124; see for general view Jaun Beebee V. Beperee 3 W.R. 93 (1865); for retraction of imputations in relation to judicial divorce, see Tufail Ahmad V Jamila Khatun AIR 1962 All. 570.

155 Baillie I. 297; Ham. Hedaya 109; Tyabji, Ss. 158-61; Ameer Ali, II 458.

156 Minhaj, 388.

157 Ham. Hedaya, 142; Amir Ali II. 415; Fatwai-Hindi X. 22.

158 Minhaj, 388.

159 Baillie I. 438; Ham. Hedaya, 141.

to vest the wife with a right to sue for a divorce judicially upon failure of the conditions. The basis of the law is the Quran which says, "O Prophet, say unto thy wives, if ye seek this present life and the pomp thereof, come, I will make handsome provision for you, and I will dismiss you with honourable dismission - But if you seek God and His Apostle, and the life to come, verily God hath prepared for such of you as work righteouness a great reward." Sipara XXI. Ch. XXIII (Wherrey's transl.). Once the power is conferred it becomes irrevocable. [160] Such confernment of the power is called *Tafwiz* when the husband says to the wife, (1) *Al-Ikhtiar*, 'chose theyself' or 'divorce thyself'; (2) *'Alam-rul-bilyade*; 'thy business is in thy hand' and (3) *Al-mashiat*, 'If thou wishest. divorce thyself'. [161]

7. CRUELTY AND OTHER GROUNDS

Upon a contract of marriage, a woman expects a particular behaviour from the husband as ordained by the Quran and the Sharia. As her rights are well-defined and upon their violations the life becomes miserable and unhappy. To such unjustified acts and omissions of the husband by acts or conducts, the wife is entitled to a decree for the dissolution of marriage contract by the court.

The basis of the law is the Quran IV. 34 (supra) for a separation on the breach of matrimonial rights and duties. The classical jurists differed on the interpretation of the texts. The Hanafi school do not recognize cruelty as a ground to dissolve the marriage, yet such a case can be sent to a Shafii judge. The Maliki school is most favourable to the wife, the Shafii and the Hanbli schools come next to it, while the Hanafi and the Ithna Ashari and the Ismaili Shia schools are the least favourable to them. [162]

160 Ameer Ali, II. 321; Fitzgerald, 77.

161 Abdur Rahim, 338; Ham, Hedaya 87-92; Baillie I. 242-244.

162 Fyzee, 143 144; Ameer Ali, II. 444.

There is a similarity of the Anglo-American law on the point of cruelty as a ground to dissolve the marriage from the Islamic provisions.[163] A legal cruelty includes any conduct of such a character as to have caused danger to life, limb or health (bodily or mental) or to give a reasonable apprehension of such a danger, and it much depends in each case upon its circumstances and in particular upon the victim's capacity for endurance.[164] The concept of cruelty is not clearly defined and the law is to take into consideration the rules of conduct of human relationships and its social engineering interpretations. The conception changes from time to time in the light of the growing social progress and the courts in administering the law have to take into account the circumstances of actual life and the changes in the people's habits and modes of living[165]

The Sharia strongly condemns adultery and fornication and the Quran explicitly provides punishment for such conducts. If a husband indulges into such conducts or forces his wife to lead an immoral life, the wife can seek judicial divorce.[166] The husband cannot interfere with the

163 Compare Russel V.Russel (1897) A.C. 395; Raydyan on Divorce, 80 (5th Ed.); Bromley, 90, et sq;see the similarity of English to Islamic Law in Munshi Buzloor Raheem V. Sham-Shunnissa Begum. 11 Moo. I. A. 551 (1867); compare Itwari V. Smt. Asghari & others A. I. R. 1960 All. 684; analyze the view "Changing concept of cruelty in respect of the restitution of conjugal rights in Mohamedan Law" in 3 J. I. L. I 244 etsq. (1961) which seems to overlook the inherent characteristic of change possessed by the Islamic law itself; see also report of the Royal Commission on Marriage and Divorce, 1951---1955 (England).

164 Ibid., Machenzie V. Mackenzie (1895) A. C. 384-405; see also Russell V. Russell (1897) A. C. 395.

165 Abdur Rahim, 44; note the view of Denning L. J. in Kaslefsky V. Kaslefsky, 2 All. E. R. 398 et sq. (1950); Rosen, cruelty and constructive Desertion, 17 M.L.R 434; Bromley, 93 et sq.

166 Mohd. Yusuf I. 27, 116.

freedom of conscience of the wife, and if he has more wives than one, he has to treat all with justice, otherwise they can seek divorce judicially [167] A marriage can be dissolved if the person was not of equal in status of the wife, to avoid social disgrace, though the Shia Schools do not recognize it.[168]

(E) AUTOMATIC DISSOLUTION OR DISSOLUTION BY OPERATION OF LAW

1. CHANGE OF RELIGION

An apostacy or change of religion from Islam to infidelity places the person outside the protection of the law, with a locus poenitentia to return back to original faith within three days before the judge passes any sentence against him.[169] The ultimate effect of apostacy is the dissolution of the marriage even without a court decree.[170] In India the law is now regulated by the Act of 1939 [171]

2. SUPERENING ILLEGALITY

It may happen that the wife or the husband by acquiring a relationship through a third party by fosterage or affinity may illegalize themselves to each other. For example, if A the husband has a grown up wife B, he then marries C who is below two years in age and the wife feeds her breast to the young wife, her marriage with the husband becomes void. So also is the case of sucking the milk of the wife by the husband. [172] Similarly if the husband commits fornication with the daughter of his wife by her previous husband, the marriage becomes void according

167 Ham. Hedaya, 30; Amir Ali II. 23, 459; Sircar, 388; Baillie I 155.

168 Abdur Rahim, 332; Mohd. Yusuf II. 72 et sq; Baillie I. 67, 69-71.

169 Abdur Rahim, 253; Schacht, Origins. 276.

170 Durrul-Mukhtar 216; Baillie I. 182; Ameer Ali II. 388; Sircar, 370; Encly. of Islam III. 736-8.

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EFFECTS OF DIVORCE

Upon a legal dissolution of a marriage, the sexual intercourse between the spouses becomes unlawful, the wife can contract another marriage with another person upon completion of the iddut period, the husband is to pay the dower debt and the parties cease to inherit each other. [174]

IDDUT OR THE WAITING PERIOD

An iddut has been provided to a avoid confusion of paternity and to make sure about the pregnancy of the woman at the time of the contract of marriage and also for the health and hygeine of the woman. The basis of the Law is in the Quran II. 228, 235, and other passages. It is for a definite period and is made obligatory by consummation of the marriage. [175] The period of iddut upon death of the husband is four months and ten days and if the woman is pregnant it runs till delivery. [176] If the marriage is dissoleved by divorce, the period is three monthly courses according to the Hanafi, Maliki and the Hanbli schools, and three Tuhrs (a period between two monthly courses) according to the Shia and Shafii schools. The husband is bound to provide for the maintenance of the wife during the period of waiting with an exception of her pregnancy according to the Shafii school which holds so only in cases of pregnancy. [177]

MODERN CHANGES IN THE LAW OF DIVORCE

Upon the basis of the democratic social patterns of modern societies, many Islamic countries have provided

173 Ham. Hedaya, 29.

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§ 5 The Law of Parentage

The word parentage or *Nusub* is commonly restricted to the descent of a child from its father, but it is sometimes applied to descent from the mother, and is occasiona-

178 See Anderson, Islamic Law In the Modern World (1959); The Syrian Law of Personal Status, in the Interl. and Comp. L.Q. VII. (1955); Reform in Family Law in Morocco in JJ. of African Law. II. 3 (1958); Recent Development in Sharia Law in Sudan in Sudan Notes and Records XXII.1 (1950).

179 See Liebesny, Impact of Western Law in the counries of the Near East, 22 Geo. Wash. L.R. 127 (1953); Religious Law and Westernization in the Moslem Near East, 2 Am. J. Comp. L. 492 (1953); Qasem, A Judl. Experiment in Libya: Unificarion of Civil and Shariat Courts, 3 Int. and Comp. L Q. 134 (1954); Schlesinger, 194 etsq.; see also the Muslim Family Laws Ordinance, 1961 (Pakistan).

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lly employed in a larger sense to embrace other relationships.[180] The birth of a child establishes maternity irrespective of marriage, but the Shia schools want a wedlock for it.[181] The law of Islam is analogous to the Anglo-American law on the subject of legitimacy, as the laws of each civilized system presume in favour of legitimacy of the children, though rebuttable by clear and conclusive evidence. A paternity of a child is not established as it is a secret matter and positive proof is required for it, but when a child takes birth to a woman duly married after six months from the date of the marriage and within two lunar years of termination of the marriage, provided the mother remains unmarried, the paternity is established with the husband. But if the child is born within a period of six months and if the husband admits it as his, the paternity is established to him, otherwise it is not so.[182] The Sharia favours legitimacy and even a child of an irregular marriage is considered as legitimate. (See supra S.1). As adoption is prohibited by the Quran (XXXIII. 4-5), a paternity is not established by it, but an acknowledgment by a man establishes it.[183]

The husband can disclaim the paternity of a child by going through the procedures under Lian or swearing before the judge, but the Sunni schools do not allow the

180 Baillie I. 391; Mohd. Yusuf, II. (1894); compare Guttmann, Presumption of Legitimacy and Paternity Arising out of Birth in Lawful Wedlock, 5 Int. & Comp. L.Q. 217 etsq. (1956); Bromley, Ch. XIII

181 Inayah III. 588; Ameer Ali II. 211-12.

182 Baillie I. 39; Fatwai Hindi II. 576; it should be noted that unlike western laws, there is nothing in the Islamic law to acknowledge an illegitimate issue as legitimate for 'legitimation' is not recognized: see Mohd. Allahdad V. Mohd. Ismail 10 All. 289 (1888); Ameer Ali II. 229; Baillie I. 391; Fyzee, 167; Prof Fitzgerald, 90-93 for a critical analysis.

183 Baillie I. 415; Sadiq Hussain V. Hashim Ali 43 I. A. 212, 224 (1916).

adoption of such a procedure in case of an irregular marriage.

The Hanafi Law holds six months as the shortest period of gestation, with Aboo Hanifa's view of two years, the Shafii law regards four years as the longest period, while the Shia law fixes it to ten months.[184] The reason of the large periods has been attributed due to individual cases as given in medical sciences in abnormal cases. However, it may have been due to sentiments of humanity, for throughout all civilized system the rule of ten months is accepted to be the longest period of gestation, and in India and in other countries it is so regulated.[185]

§ 6 The Law of Guardianship

GENERAL

Guardianship or *Wilayat* is a right to control the movements and actions of a person who, owing to mental defects, is incapable to take care of himself in managing his own affairs, as for example an infant, idiot, and a lunatic.[186] The law protects the interests of such persons by taking cares of their person, property, and other related interests. It is not an absolute right of any one individual to become a guardian of minor but it is the

184 Baillie I. 392; 3 Minhaj 44; Ham Hedaya 137; Querry I. 739; Baillie II. 90.

185 Ameer Ali II. 191 etsq; see the Indian Evidence Act, 1873 and S. 112, which overruled the Sharia rules, see Rahim Bibi V. Chiragh Din AIR 1930 Lah 97; Hajra Khatun V. Amina Khatun AIR 1923 All. 570; Nurul Hasan V. Mohd Hasan 75 P. R. 1910; compare on legitimacy in general, see Coke on Litt. 244a; 1 Blackstone, 454; American Restatement of the Conflict of Laws, S. 137; Hazard, The Child under Soviet Law, 5 U. of Chi. L.R. 424 etsq. (1938); Moureaux, The French Case-Law as to Disavowal of Paternity, 6 Tul. L. Rev. 444 etsq. (1932); Prof. Anderson in 41, The Muslim World, 197 (1951) for the Middle East.

186 Abdur Rahim, 394; Huberich, the Paternal Power in Mohd. Law, 12 Yale Law Jl, 93 96 (1902).

fundamental principle of the law to promote the welfare of the minor. It comprehends firstly in the care of the person of the minor arising by *Hizanat* or custody, secondly, through the supervisory direction over his person, and thirdly, in the administration and care of his property.[187]

The pre-Islamic Arabia had no settled sovereign state, the Islamic law regulated the matters and interest of the weaker person, and the Quran explicitly laid down rules for the laws relating to the guardianships of such weak persons. The Quran is the basis of the law relating to guardianship (See IV.V. 2, 6 [188].

AL-HIZANAT OR CUSTODY OF MINORS

Hizanat is right of rearing up the child by the mother and the father must provide for it and the mother. The mother is, of all persons, the best entitled to the custody of her infant child during marriage and after separation from her husband, unless she becomes an apostate or wicked or unworthy to be trusted. The wickedness is injurious to the child as zina, theft or being a professional singer, for a person who leaves out the child by going out is not to be trusted. [189] The custody of a boy below seven years and a girl till the age of puberty belongs exclusively to the mother and on her default to the mother's mother, and after that period, according to the Hanafi law the child must be given back to the father or after him to the paternal relations.[190] The Shafii school says that if the mother is living, the child has the choice to be with her

187 Ameer Ali II 539; see the discussions by Malmstrom, Children's Welfare in Family Law, I Scandinavian Studies in Law, Ed Schmdt, 123 etsq (1957) cited by Schlesinger, 536.

188 Ibid. 540.

189 Baillie I. 435 citing Durrul-Mukhtar, 280; Fatwai-Alamgiri I. 728 etsq.

190 Ibid. 439; Ham. Hedaya 139.

even after the prescribed limit of time, while the Shia schools hold that the mother's rights end when male child becomes of two years and a female becomes of seven years in age.[191] The traditions of the Prophet too mention accordingly with a prime consideration for the welfare of the minor. [192]

The right of the mother to custody of the child is lost if she marries a person not related to the child within the prohibited degree, so long as the marriage subsists, by going to reside at a distant place from the residence of the father except in case of a divorced wife who can take her child to her own place of birth, which was also a place of contract of the marriage, otherwise by failing to take proper care of the child, and by gross and open act of immorality she forfeits the right. [193]

GUARDIAN FOR MARRIAGE (See supra sect. 2)

GUARDIAN FOR PROPERTY

After Hizanat, guardians are either natural, testamentary or appointed by the judge. The first and primary natural guardian is the father, and in his default his executor appointed by him according to the Hanafi school, but if he has not so appointed it belongs to the father's father or his executor after him. The Shia schools hold that the right of grand-father is to be preferred to the father's executor. In default of all, the judge has the right of management of the properties of the minor as a representative of the state. [194] A mother is not a natural guardian of the minor, but if she is validly appointed as the executrix of the father, she can be a testamentary guardian. [195] An executor is not entitled to dispose of the immovable

191 Ameer Ali II 542; 3 Minhaj, 98; Baillie II 95; Querry I. 746.

192 Mohd. Yusuf I 141.

193 Baillie I 438; Ham. Hedaya, 138-39.

194 Ameer Ali, II. 540, 641; Fatwai Alamgiri VI. 223; Abdur Rahim, 346.

195 See Imambandi V. Mutsaddi 45 I.A. 73; Ameer Ali II. 544.

property of the minor, though he can do so as regards the movable property for the behefit of the ward. [196]

The Sharia carefully defines the powers of the guardian of the property of the minor, for he must avoid losses of the minor's interests. [197]

The Sharia prescribes various rules regarding the alienation of immoveable property by the legal guardian. He cannot sell or mortgage such property of the minor except, when he can obtain double the actual price of the property, in necessities, in case of legal debts, to pay a legacy from the property, where the expenses of maintaining the property exceed its income, where the property is falling into decay, and where the property is in the hands of a usurper and the guardian bonafide believes that there is no chance of recovery, but he cannot trade with his ward's properties. [198]

The law of the Sharia is regulated by the general laws in India and Pakistan. [199] The powers of the guardian terminates according to the provisions of the Islamic law, when a male or a female minor attains the age of puberty which is the same as the age of majority. [200] Much depends upon the stock, race diet and climate for a minor to attain majority which is the age of puberty or the age of discretion. [201]

196 Fatwai-Alamgiri VI. 223.

197 Ham. Hedaya 553; Durrul-Mukhtar, 846; Baillie I. 689.
Compare the English Guardianship of Infants Act, 1925; Guardianship and Maintenance of Infants Act, 1951; The Children and Young Persons Act, 1933; Bromley, Ch. XVI.

198 Baillie I 687; Ham. Hedaya, 702

199 See The Guardian And Wards Act, 1890; for Egypt, see Prof. Abu Zahra in Law In the Middle East. 157.

200 Ham. Hedaya, 529: Baillie I. 4.

201 Ibid. 527

§ 7 The Law of Maintenance

GENERAL

Nafqah or maintenance in the language of the Sharia signifies all those things, which are essential to the support of life, such as food, clothes, lodging, toilet requisites, but it excludes luxaries like hair-dye, Kohal, liptstick and similar articles of comfort.[202] It is established by the reasons of marriage, relationship and property by which a person becomes incumbent to maintain another, and there is more or less much similarity of the law of the Anglo-American or other civilized systems of the world.[203] The Islamic law is derived from Quran LXV. 6, 7, XVII. 23. 24, 26 for the maintenance of persons in a family.

OF WIVES

It is sanctioned by the law that a husband is bound to maintain his wife, irrespective of her being a muslim, non-muslim, poor or rich, young or old, if not too young to be unfit for matrimonial intercourse.[204] The theory behind the law is that it is a recompensation for the matrimonial restraint of the wife by the control of the husband.[205]

A minor unable for sexual relations is not entitled to maintenance according to the Hanafi school, but not according to the Shafii school.[206] If the woman leaves the custody of her husband without his consent and becomes rebellious, the husband is under no duty to maintain her,

202 Ham. Hedaya, 140; Baillie I 441; Mohd. Yusuf II. 264.

203 Baillie I. 44; Durrul-Mukntar, 283; compare, The English Matrimonial Causes Act, 1950, Ss 19, 20, 22; Chichester V. Chichester 1 All. E. R 271 (1936); Griffith V. Griffith 1 All. E. R. 494 (1957); Bromley, Ch. XI.

204 Baillie I. 44; Fatwa Qadi Khan I 479; Ruddul-Muhtar II. 1062; Fatwa-Alamgiri, I. 732.

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The law of the Sharia is regulated by the general laws in India and Pakistan. [199] The powers of the guardian terminates according to the provisions of the Islamic law, when a male or a female minor attains the age of puberty which is the same as the age of majority. [200] Much depends upon the stock, race diet and climate for a minor to attain majority which is the age of puberty or the age of discretion. [201]

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206 Ibid. 141.

unless, she surrenders herself to him, but if she refuses due to the non-payment of her prompt dower, the case is otherwise.[207] The husband is bound to provide the wife with a separate residence for her living and the judge even upon a proper complaint of the wife order the husband to arrange for her house in a neighbourhood of independent and trust-worthy people.[208]

If the wife has servants, according to Abu Yusuf, the husband is bound to provide maintenance for them, while Abu Hanifa holds it unnecessary for a poor man, but the Shafii school holds the duty where the wife is of good social standing.[209] In cases of sickness of the wife, she is entitled to maintenance, but it is not the duty of the husband to provide medical expenses, according to Hanafi view, but otherwise according to the Shafii law where he is liable to the medical expenses too.[210]

The wife can take judicial remedies for maintenance and also can borrow for it upon the credit of the husband.[211] The Hanafi school rejects the rights of the wife for past maintenance unless it was fixed at the marriage contract or judicially determined, but the Shafii and the Shia schools allow it.[212]

The legal effects of failure of the husband to maintain the wife give rise to the right of the wife to sue for a judicial divorce according to the Shafii Law, but not so according to the Hanafii jurists.[213] The husband has a duty to maintain his divorced wife under—going iddut or

207 Ibid.; Baillie I. 453 (if the wife commits adultery, it is submitted, that she forfeits her right).
208 Baillie I. 453.
209 Ham. Hedaya. 142.
210 Baillie I. 446; Minhaj, 384.
211 Baillie I. 445; Ham. Hedaya. 147.
212 Ham. Hedaya 421; Baillie I. 447. II 100.
213 Ham. Hedaya. 142.

waiting period according to the Hanafi views, while the Shafii and the Shia schools make pregnancy as a condition precedent for it.[214] But if the separation of the parties has originated from an act of the wife herself she is not so entitled for maintenance during the iddut, and similar is the case of dissolution of a marriage upon the death of the husband for a widow is not entitled for maintenance on the basis of the Quran (II. 240).[215] It is of interest to note the differnce of interpretation of the Quranic text upon the maintenance of the widow during an iddut, among the schools.[216]

OF RELATIVES

During the pre-Islamic Arabia, there was no obligation on the part of either of the parents to maintain their children or relatives.[217] The Islamic Reformation abolished such practices and provided for proper maintenance of these people, and even in the eyes of the law, a difference of faith makes no difference upon an obligation to maintain.[218] The father and the mother both are liable to maintain their children,[219] and though the duty lies primarily upon the father, it is the duty of both of the parents even in cases of divorce to maintain their infant children.[220]

A person of either sex who is in easy circumstances is bound to maintain every poor relative within the prohibited degrees of relationships of persons if male, is either a minor or infirm; if female, is husbandless or married to a

214 Ham. Hedaya, 45; Baillie I. 454; II. 98, 170; Minhaj, 387.
215 Ham. Hedaya 145; Agha Mahomed Jaffar Bindaneen V. Koolsum Bee 7 M. L. J. 115 P. C
216 See Abdur Rahim, 45, 112; A. Yusuf Ali. The Holy Quran, Text, Transl & Commentary, I. 273; compare Mohd. Ali, English Transl. of the Holy Quran, 317.
217 Ameer Ali II. 426.
218 Fatwai-Alamgiri I. 750.
219 Ibid. 750.
220 Ham. Hedaya 146; Baillie 1. 459.

husband who cannot or will not support her, though in such a case he can reimburse himself from the husband.[221] If the children are in easy circumstances they are bound to maintain their parents (but not step-parents) who are poor.[222] But a person in uneasy circumstances is not bound to maintain any of his blood-relations other than lineal descendants, or lineal ascendants.[223] The maintenance due to a relation within the prohibited degree is always in proportion to the shares of inheritance which the person maintaining may inherit if the person maintained suddenly acquires a property and dies, leaving no other relatives.[224]

In India and Pakistan the Sharia is co-sided with the general law of the land which regulates the law of maintenance in general.[225]

221 Baillie I. 463; Wilson, 205.
222 Ham. Hedaya 148; Wilson, 205.
223 Ham. Hedaya 148; compare Baillie I. 463 where the rule is stated otherwise; see Wilson, 206.
224 Baillie I. 463; Ham. Hedaya, 148.
225 See S. 488 Criminal Procedure Code, 1898.

VII

The Law of Property

§ 1 Preliminary Observation

The word 'property' has varied types of meanings, for it may denote ownership, a title and often may convey the object upon which a person's ownership may be exercised. Individuals may claim to control and apply to their purposes what they discover and reduce to power, which may give them a natural title to property.[1] The English Common Law by the Law of Property Act of 1925 defines the term that a "Property includes anything in action and any interest in real or personal property", for the term is most comprehensive of all terms in including also dominion or the right of ownership or of partial ownership indicative and descriptive of every possible interest to be owned and possessed by an individval. The French Civil Code of the Civil law system says that, "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided that they are not put to a use prohibited by statutes or by regulations."[2]

The immediate counterparts of western concepts of property and ownership are the terms '*Mal*' and '*Milk* of the Islamic system. The term ownership in Islam denotes a relation between a particular person and a thing remaining under absolute power and control to the exclusion of all others,[3] and the the term 'Mal' denotes a thing which can be hoarded or secured for use and enjoyment, having a

1 Pound Philosophy of Law, V, 191 et sq; Salmond, Ch. 20 (11th Ed).
2 Article 544; see David and Vries, The French Legal Systam, 127; for Soviet system see Berman, Soviet Property in Law and in Plan, 96 U. Pa L. R 324 et sq. (1948); Real Property Actions in Soviet Law 29 Tul. L. R. 687 (1955).
3 Abdur Rahim, 262 citing Sharhi Viqayah II. 173.

perceptible existence.[4] Upon a mixure of the two Islamic terms a property has three attributes, the first is that it must have some value, secondly, it must be a thing the benefit of which remains permissible and thirdly, it must be capable of possession.[5] Upon a comparison of the two systems, it follows that the idea of property in the western systems is too wide, for in the Islamic system if the essential characteristics of the term are not present, it is not a property. The reason of the rule is that for a Muslim a thing forbidden and not fit for use is not a property, though it may be so for a non-muslim, according to the views of the Hanafi and the Maliki schools.

Those things which cannot be turned into property or in other words which cannot be exclusively used by one or more individuals, such as air, light, fire, water of a stream and which are common for all persons are precluded from the definition of property, and are for uses of all freely. In modern times the socialist view permits such uses without any restraint. All things unless possessed of some advantages cannot strictly come under the concept of property. Some things may be of so little in practical value that the law in Islam would refuse to recognize at all. and as its quality is of a petty nature, it cannot be considered to possess any subject of charge upon use by any person. If any person picks up a handful of earth from another person's ground, no liability will be incurred for stealing or trespassing on other's rights and properties, upon the maxim '*De Minimis Non Curat Lex*' or that the law takes no account of trifles.

The concept of property in Islam has rights with responsibilities, for ultimately all properties belong to

4 *Ibid.* 263 citing Talwih, 325; see also Raddul-Mukhtar, IV 3.

5 Subhi Mahmasani in Law In the Middle East, 179; "Ownership is also unconditional: and restrictions cannot be imposed upon a transfer whether by sale or gift" of a property: Cf. Prof Fitzgerald, Mohd Law, 188 citing Cobb V. Rashid. 3 East African L. Rep. 35.

the community, so its proper use is of main importance. The Quran sanctions that, none should misuse his property, nor illegally devour other's property. The Holy Book takes the modern socialistic interpretation of property and clearly says about equalities in property relations as, "What God gave as spoils to His Apostle of the people of the cities is God's, and the Apostle's, and for kins-folk. orphans, and the poor, and the way-farer, so that it should not be circulated amongst the rich men of you." LIX. 7 (Palmer's transl.). Thus it is clear that a property – use is for the ultimate support of the general public and to waste a property is utterly wrong in the eyes of the law. For the better use and prosperity, the Quran sanctions particular and beneficial modes of uses of property for the general community or public, as it says, "O ye who believe ? devour not your property amongst yourselves vainly, unless it be a merchandise by mutual consent ....." IV. 33 (Palmer's transl.). The Islamic theory takes care of the uses of properties for commercial aud business purposes, and it seems to be somewhat akin to the modern notions.

§ 2 Acquisition, Ownership and Possession

ACQUISITION

To the Roman jurists under the influence of the Stoics the conception that most things were destined by nature to be controlled by men by the expression of natural purpose were owned, while others, not so controllable were to be used only but not owned and which were adopted for general use as res communes. In the modern world various theories such as the Natural law, Metaphysical, Sociological and others are accepted in order to give man a rational account of private property as a social institution.[6] In Islam ownership is acquired by either taking

6 Pound. Philosophy of Law, V.

possession of res nullius called *Ihraz*, or by transfer called *Naql* or by succession called *Khalf*.[7]

The first mode of acquisition is loosing its place with the growth of population, yet still it is seen while fishing in a pond for catching fish or for hunting in the jungle. The second mode is seen in the law of transfer of property, while the third is a part of the family law. Though the modern system recognized prescription as another mode of ownership, yet in the classical theory of the Islamic system it could not be so acquired, but under the impact of the west it has come to be recognized in its practical shape in courts of law. It were only the Hanafi and the Maliki schools who accepted limitation solely in the shape of an estoppel against the claim of the real owner and the Majalla following the equity of the doctrine provided that the action relating to a claim of ownership should not be instituted if the real owner has abandoned the property for a period of fifteen years or more without any legal disability, and so he would be barred to claim it back from the possessor.[8] Similarly, the law permitted acquisition of rights connected with property in the nature of a right of way over another's land or a right to discharge rain water and according to the makers of the Majalla also a right to a certain amount of privacy for females.[9]

OWNERSHIP

The word 'ownership' had complicated theories as to its nature and meaning according to the early law.[10] However, the concept has much difficulties when differen-

7 Abdur Rahim, 280; Sultan of Zanzibar's Govt V. Att. General, 4 East African L. Rep. 142.

8 Mahmasani in Law In the Middle East, 184.

9 Abdur Rahim, 281; compare Gutteridge and Walton Comparative Law of the Right of Privacy, 47 L. Q. R. 203 et sq. (1931); see White Jr., Acquisitive Prescription of Servitudes, 15 La. L. R. 777 etsq. (1955).

10 Holdsworth, History of English Law, II. 78.

tiated with its relative- in-blood, the concept of possession. The full rights of ownership has characteristics that the owner must have the power of enjoyment with possession, of alienation and the power to leave the *res* by will, for the property right is essentially a guarantee of the exclusion of other persons from the use or handling of the thing.[11]

In the Islamic law a person who is the owner (Malik) of a property must have with it, firstly, the proprietory rights (*Milkul-raqba*), secondly, the right of possession (*Milkul-yad*) and thirdly, the right of disposition (*Milkut-tasaruf*). The proprietory right is contained of the total bundle of rights possessed by the owner, with the right of possession and disposition. It is fundamental principle of the law that during the life-time the owner may dispose of his property according to his will, and no heir has any interest in the property. But the law has placed certain restrictions upon the testamentary power of the owner, though in other respects he is totally free to do so upon his own choice.

Two or more persons may be owners of a property at the same occasion, and until there is a regular partition none of such co-owners can have exclusive possession over the common property which is called *Musha* in the language of the law. In such a case the title of the one is rendered consistent with that of the other co-owner by the existence of reciprocal obligations of a restricted use and enjoyment.[12] The enjoyment of joint property by all the owners being practicable only if they agree among themselves, for the law gives to each one of them, the right to to ask the court for partition (*Kissmat*).[13] A partition, in the Islamic law, applies to joint property in whatsoever

11 Paton, 420 citing Wigmore's Select Cases on the Law of Torts, II. 858.

12 Salmond, Jurisprudence Ch. 20 (11th Ed.).

13 Abdur Rahim, 272.

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manner obtained or acquired, it more immediately relates, indeed, to the distribution of inheritance, and there is no distinction, in terms, between a partner and a parcener.[14] It is incumbent upon the Qadi or the judge to appoint a person to make a partition and to settle on him an allowance for the public treasury (as the modern stamp duty and court fee), so that a partition may be made for the people without his receiving any hire.[15]

Islamic law does not recognize tenancy in common as it is said that joint tenancy is a foreign institution in it. The form of ownership in Islamic law is, that the right of a dead man descends to his successor like other inheritable rights forming a part of deceased's estate. For example two persons buy a property jointly with an agreement that on the death of either of them, the other will become its sole owner by survivorship, such an agreement will be inoperative and ineffective and so the property will descend to the heirs of the deceased party.[16] The only form of ownership recognized by the Islamic law is co-ownership and the term ownership may be best explained with the Majalla as follows: "A thing is being shared between or ascribed to two or more persons on the basis of any cause of ownership, such as purchase, gift, bequest, or inheritance, or by the pooling and amalgamating of their property in such a way that it cannot be distinguished or separated"[17]

CLASSIFICATION OF PRPOPERTY

With a brief review of the term ownership in the Islamic law, a property may consist of the followig major categories:

14 Ham. Hedaya, 565.

15 Ham. Headaya, 566.

16 Abdur Rahim, 271.

17 Article 1060 of Majalla cited by Mahmasani In Law In the Middle East. 185.

1. MOVEABLE AND IMMOVEABLE PROPERTY

The movable property, is called *Manqul* and the immovable is called *Ghairu manqul*. The former is that kind of property which can be transferred from one place to another, or in other words it can be perished by wear and tear. The immovable property or real property is that which cannot be transported and lands, buildings, come into such property.[18]

2. SIMILAR AND DISSIMILAR

The similar is called *Mithli* and dissimilar as *Qimi*. An article when available in the market without their being such as the people may take into account in their dealing is called a similar property, and if such articles are ordinarily sold in the market by weight or capacity, they are called similars of weight and capacity such as gold, silver etc. But if the article is not available in the market or if so available it has such a difference that the people are wont to take into account in fixing the price, it is called a dissimilar property. Such things are not ordinarily sold by weight or capacity as land, buildings, animals, furniture and the like.[19]

3. DETERMINATE AND INDETERMINATE PROPERTY

The similar property is generally available in a similar class in the market, for instance if one agrees to sell ten bushels of rice to an individual, he has the right to deliver to him any ten bushels of rice so long as it is of the prescribed quality, but if one agrees to sell to another person his own horse, he has to deliver to that person the particular horse, and not a similar horse. Such properties when classified are either determinate or *Ayn* or indeterminate or *Dayn*. The main test of distinction is whether a man is to get certain property from another person who

18 Abdur Rahim, 267; Prof. Fitzgerald, 189.

19 Ibid. 268-9.

either borrowed it from him or took it by force, he is entitled to recover it in specie or not; if he is so able to recover, it is called determinate or specific and if he is not, then it is non-specific or indeterminate property.[20]

Generally, all non-specific property rests on the mere responsibility or obligation of the person from whom it is recoverable and so it is similar to a debt. The classification herein mentioned is of great practical importance in the Islamic legal theory, and to better appreciate the laws of Gifts, Wills and Wakfs, it is necessary to have a knowledge of it.

POSSESSION

As ownership is the right granted by law to an owner to derive benefit from a particular thing or the usufruct owned legally, so is the overt use of the benefits of property is termed possession in the language of the law.[21] In the whole range of the legal theory there is no concept more difficult than of possession, for its legal consequences are seriously varied in nature.[22] It creates ownership and remains a prima-facie evidence of it, for under the English law, a title to chattels can be set up as a defence in a possessory action,[23] and the other party has the burden of proof in order to judge the case upon the basis of the status quo ante.[24]

A possession is of two kinds. It is either actual i. e. *Haqiqi* such as when a man takes a things in his hand, or symbolical called *Hukmi* when a person has only a symbolical possession of his house, land, etc. The ingredients required to constitute a man in possession are, that there

20 Ibid. 269.
21 Mahmasani; 182-183.
22 Salmond, Jurisprudence, Ch. 13 (11th Ed.).
23 Paton, 452 citing Holmes, The Common Law. 210.
24 Mahmasani 183; Prof. Fitzgerald, 190 citing Sudi V. de Souza 1 Esat African L. Rep. 2; Sudi V. Mahammed 1 East African L. Rep. 3.

must be an intention to exclude others and its power to do so. For example, a guest may be in my house but he has no intention to oust me from my possession, but if a tresspassor enters and forces me to go out of the house, then he is deemed to have possession of my house. An owner may or may not have possession such as a house rented to a tenant, but a possession does not imply ownership. Considering the value of possession which is considered to have a root of title or ownership, the Hanafi school has established a rule that in a gift possession must be delivered and similar remain the views of other schools upon other parts of the Islamic property law.

EASEMENTS

When an ownership is applied to *Manafa*, use or usufruct, it includes the rights existing in another's property, such as an easement, which may be as a right of way over the property of another person called *Haqqul-marur* and the right to the use of water from such property.[25] Such rights are not property rights, but remain a right connected with it. Its further shapes may be the right to the flow of water called *Haqqul-majra*, or a right to discharge rain water over another's land called *Haqqul-masil*.[26] Such rights are to be enjoyed continuously and cannot be enlarged and become lost by disuse.[27]

A claim in a right to water or *Shirb*,is valid independent of any property in the ground, for a person may become endowed with it exclusive of the ground, either by inheritance or by a bequest, or it might be reserved by the owner when sold.[28] There is no right in any person to

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28 Ham. Hedaya 616.

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alter or obstruct the course of a running water through his ground, though in cases of dispute such a right to water may be distributed.[29] If a person having moistened his lands, or filled them with water should by that method overflow the lands of the adjoining owner, he is not liable to make compensation, as he is not guilty of transgression.[30]

PRE-EMPTION

The Islamic Jurisprudence also recognizes in relation to an immovable property certain rights which restrain the power of alienation of the real owner and which are generally called *Shufa* or pre-emption.[31] (See details in Ch. XI Infra).

29 Ibid.

30 Ibid; campare: Rylands V. Fletcher 3 H. L 330 (1868) and comments by Salmond, Tort (5th Ed.); Pollock, 25 L Q.R. 321 (1909); Price, Is the Rule in Rylands V. Fletcher Part of Roman-Dutch Law? 70 S.A.L J. 381 (1953).

31 Abdur Rahim, 272; Ham. Hedaya, 547.

VIII

The Law of Succession

§ 1 Preliminary Observation

Various theories have been advanced regarding the origins of the law of succession, and it is yet undecided whether the pre-historic times originated with agnatic genetes or with hordes reconed by mother or by cognate relations, or whether a family ownership was the reason of its. [1] However, the researches show many factors for it, for the law considers the class of person dependent upon the original owner and the types of relation favoured by him. The estate may devolve according to the rules of primogeniture or ultimogeniture or to the relationship through kinship. [2]

The law of succession prevailing in the pre-Islamic Arabia was based on customs and the law of blood-feud. The biggest unit was the tribe and the smallest was the family, so if any person lost his life by the act of another, the rule was that his male descendants were to revenge him, then his brothers, paternal uncles and cousins and then other agnatic relations. Due to this force theory, females, minors, and infirms were often excluded. Generally, the customary law of pre-Islamic Arabia recongnized three grounds of inheritance, i.e. by agnatic relationship, by contract and by adoption, and the descendant relations were preferred to ascendants, and ascendants to collaterals. In cases where the agnates were equally distant, the estate was divided per capita. [3]

1 Pollock and Maitland, History of English Law, II. 237; Maine, Ancient Law, Ch. VI.

2 Paton, 445 etsq; Bentham, Principles of Morals and Legislation; Holmes, The Common Law (1881), for French law see Dainow, Forced Heirship in French Law, 2 La. L. R. 669 etsq. (1940).

3 Fyzee, 331; Tyabji, S. 602; Abdur Rahim, 15 etsq.

The Islamic Reformation repealed or amended the rules of succession of the pre-Islamic Arabia, and introduced the principles of equality with the changes of time. The rules which regulated the law of succession were based upon the principle that the property of the deceased should devolve on those who by reason of consanguinity, or affinity have the strongest claim to be benefited by it and in proportion to the strength of such claim, with harmonious distribution of estates among the claimants, in natural strengths of their claims. [4]

The primary basis of the law of inheritance are the Quran, the traditions and the Ijma or consensus of opinion with the exclusion of Qiyas or analogy. [5] The Quran directly legislated the rights of inheritance (See IV. 8, 9, 12, 13, 33, 34, 170, VIII. 75), and the traditions have been largely relied by the Sunni schools. The rights are based on, (1) relationship by *Nasab*, or kinship (2) by *Sabab* or for special cause viz. by a valid marriage, and (3) *Wala* or clientage. [6] The Sharia does not for the purposes of inheritance differentiate between the ancestral and self-acquired, movable aad immovable, corporeal and incorporeal or separate and joint properties, for it is a fundamental principle that during the life time of a person, none of his expectants has any interest in the property and he can alienate the property inter vivos without any control by the heirs, with exceptions in cases of gift in death-illness. [7] The estate fit to be inherited consist of all and every kind of property owned by the deceased person, his gifts at death-bed, and compensation money to which he was entitled to receive from another person. A person must be in existence to inherit the property and upon this principle a child in the womb of the mother is

4 Abdur Rahim, 346; Dr. M. U. S Jung, The Muslim Law of Inheritence, 31 A. L. J. 9-30 (1933), 32 A. L. J. 1-12 (1934).

5 Fatwa-Usmani, Kitabul-Mirath, 17.

6 Ameer Ali, II. 47; Durrul-Mukhtar, 852.

7 Fatwa-Usmani, Kitabul-Mirath, 16.

considered to be in existence, if he is born alive. [8] The law recognizes a homicide, difference of religion and slavery as the grounds of exclusion from inheritance, and the law of the sect of the deceased governs inheritance. [9]

The Sharia recognized the vesting of the estate of the deceased subject to certain obligations in the heirs from the time of the death of deceased, as "there belong to the property of a person deceased four successive duties, to be performed by the magistrate: first, his funeral ceremony and burial without superfluity of expense, yet without deficiency, next the discharge of his just debts from the whole of his remaining effects; then the payment of his legacies out of a third of what remains after his debts are paid, and, lastly, the distribution of the residue among his successors, according to the Divine Book, to the traditions, and to the Assent of the Learned". [10]

The Islamic law of inheritance is criticized as arbitrary, as being based upon the whims of religion, yet if the systematic and mathematical characteristics of it are examined, such a view is untenable, for it is accepted that all arising questions are answerable by the law in completeness, for adjusting the competitive claims of all the nearest relations. [11] For these amongst other reasons, the Prophet said that, "Learn the laws of inheritance, and teach them

8 Ibid.; Abdur Rahim, 346.

9 Ibid. 389; Baillie I. 707.

10 Al-Sirajiyyah, transl. by Sir William Jones with notes etc. by A. Rumsey, 11-12 (2nd. Ed.); compare the western systems on paymets of debts and other liabilities by the heirs of the deceased: see; England: The Inheritance (Family Provisions) Act, 1938; Laskin, 17 Can B. R. 181 (1939); Rheinstein in 20 Iowa L. R. 431 (1935); Simpson and Stone, Law and Society (1948-49 Ed.); see also the Intestates Estates Act, 1952; Unger, The Inheritance Act and the Family, 6 M. L. R. 215.

11 Tyabji. S. 601; Fyzee, 329; the Sharia provisions of exclusions of share of a son or daughter of a predeceased son or daughter by non-recognition of right of representation seems critical and similar

to the people; for they are one-half of the useful knowledge;" [12] and though centuries have passed, the Sharia rules of inheritance even today are constantly admired for the formal beneficial utilities and remain one among the magnificient systems in the field of the law of acquisition of title by succession, after the death of the owner.

§ 2 The Law of Inheritance

GENERAL

After the death of a person, the rights and obligations possessed by him are transferred to his heirs and representatives. Such rights include all rights to property, usufruct, debts, choses in action, and others and after the payments of funeral expenses and other obligations are discharged, the estate is to be distributed according to the law of succession. [13] The topic has a vast and subtle area of discussion, beyond the scope of our present purpose, so a brief and lucid attempt is made to discuss the main underlying juristic principles of the law, and the reader is referred to main text-books of the substantive law for details.

may be the position of a wife upon the death of the husband. But see S. 4 (succession) of the (Pakistan) Muslim Family Laws Ordinance, 1961 which provides that, "In the event of the death of any son or daughter of the propositus before the opening of succession, the childern of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive." (Cf. Ordinance No. VIII. of 1961); see Anderson, Islamic Law In the Modern World (1959) for reforms made in Muslim countries and suggestions thereto. Note the better provisions of the English law ref. in note 10 supra and elsewhere above; but however see Dr. Jung's remarks in 31 A. L. J. 11 (1933) for replies.

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THE DEBTS OF THE DECEASED

Two schools of thought hold differently regarding the matter of estate subject to debts. According to the Hanafi and Maliki schools the ownership of the heirs is confirmed with regard to that part of the estate not under debt, in other words, in an estate charged with debt, no ownership could be created, on the principle that the deceased's obligations continue until and after his debts are paid and his bequests are executed. [14] The Shafii and Hanbli schools take a different view. They hold that even if the estate is so burdened, the ownership passes to the heirs with the claims of creditors to satisfy the claims by selling the property. [15] After the claims are liquidated by the executor or in his default if the judge appoints or directs regarding it, the heirs can either divide the estate or continue to hold it in joint tenancy or *Kashan-Kull-al-Shuraka*. [16]

THE CLASSES OF HEIRS

Primarily the Sharia divides the heirs of a deceased muslim into three classes respectively:

1. Quranic heirs or *Dhawul-furud* called Sharers;
2. Agnatic heirs or *Asabat* called Residuaries;
3. Uterine heirs or *Dhawul-arham* called Distant Kindred. [17]

The law further provides that, in the case of default of either of the above, the estate of the deceased devolves upon:

1. Successors by contract or *Mawalal-mawalat*, or
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4. The State by Escheat or *Bait-al-Mal.* [18]

1. SHARERS

It is generally accepted that some person's shares out of this class have already been fixed by the Quran, the traditions or by Ijma. The number of sharers are twelve viz. four males and eight females : father, father's father (h.h.s), half-brother by the mother, the husband, the wife, daughter, son's daughter (h. l. s.) full sister, consanguine sister, uterine sister, mother and true-grandmother. It is to be noted that a true grand-father means a male ancestor between whom and the deceased no female intervenes (if so he is called false grand-father), and similarly a true grand-mother is the female ancestor between whom and the deceased no false grand-father intervenes otherwise she is a false grandmother. [19]

"The shares of the 'sharers' in the inheritance are either one-half, one-fourth, one-eighth, two-thirds, one-third or one-sixth". [20] The husband receives one-fourth when there is a child or son's child, and one-half when there is no child; the share of the wife is one-eight in case of a child or a son's child, and one-fourth when there is no child. The daughter receives one-half share when there is only one or no son, and in cases of two or more daughters in default of a son, they take two-third among them, and the son's daughter takes one-half if only one in default of a child or son's son. If there are two or more son's daughters and no child or son's son, they take two-thirds otherwise one-sixth in case of one daughter or a higher son's daughter in default of a son. The share of a sister when there is only one son or no son or son's son, father, daughter, son's daughter or brother is one-half, but if there are two or more sisters, they take two-thirds. The consanguine

18 Ham. Hedaya, 518; Fatwai-Usmani, Kitabul-Mirath, 188; Baillie I. 695.

19 Fatwai Hindi X. 424; Abdur Rahim, 347.

20 Abdur Rahim, 347.

sister takes one-half in default of a son or consanguine brother or sister, but if the latter relatives are present, they take two-third and the consanguine sister takes one-sixth provided there is one full sister but no son or others. The mother takes one-sixth with a child or son's child or two or more brothers or sisters, otherwise one-third, but this one-third is to be taken only out of the remainder after deducting the wife's or husband's share in cases where the husband, wife and the father are alive. The true grand-father inherits one-sixth when he is not excluded and the uterine brother or sister gets one-sixth when only one and no child or son's child, father or true grandfather, and if there are two or more of them they will get two-thirds in the same circumstances. [21]

The Sharia further regulates the inheritance among sharers. Firstly, the rule is that the nearer sharer excludes the remoter, as for example, the mother excludes the true grandmother, though sometimes she may not inherit. [22] Secondly, there must be an equal distribution of shares between uterine brother and uterine sister. Thirdly, the true grandmother both paternal and maternal is excluded by the mother, the father excludes the paternal grand-mother but not maternal grandmother, but the grandfather does not exclude true paternal grandmother. [23]

2. RESIDUARIES

The residuaries or 'Asabat' or the agnatic heirs, are male relatives of the deceased who in descent are not separated from him by a female, inherit the remainder left by the distribution of shares among the sharers. [24] They inherit as the tradition of the Prophet has said that, "what is left over from fixed commitments belongs to man's relatives

21 Al-Sirajiyyah, 14-23; Abdur Rahim, 347-48.

22 Fatwai-Hindi, X. 429.

23 Ibid.

24 Prof. Abu Zahra, 172; Abdur Rahim, 348; Al-Sirajiyyah, 23.

in the male line," with some exceptions.

The legal theory of Islam has divided them into, (1) those related by filiation or descendants whose relationship is not broken by the intervention of a female, (2) those related by father, the true grandfather and similar in the ascending line, (3) those related by fraternity or male descendants of the father in whose line of relationship no female intervenes and (4) those related by the uncle or similar descendants of the true grandfather. [25]

The only females who can come under residuaries are, (1) full sister or sisters by the same father if they are either brothers or female descendants who inherit, (2) daughters and daughters of a son who have sons or sons of sons to give them the status of agnatic relation. [26] The result is that residuaries are of three kinds, (1) a residuary in his own right, (2) residuary in another's right, and (3) residuary with another. If there is no residuary of the first grade, the inheritance devolves upon the residuary of the second grade, and in the default of the second, the estate devolves upon the residuaries of the third grade, but in cases of residuaries of the same grade, the nearer in degree excludes the more remote.

The residuaries of their own rights are the old male agnatic heirs who were also in the pre-Islamic customary laws and consist of (1) parts of the deceased viz. his sons, grandson (h. l. s), (2) roots of the deceased viz. his father, and grandfather (h. h. s.), (3) parts of the father of the deceased viz. brothers, brother's sons, and, (4) parts of the grandfather of the deceased viz. paternal uncles and their sons (h. l. s). Residuaries with the others are those females who are entitled either to one-half or two thirds by becoming residuaries and co-existing with their brothers. Such females were the daughter, daughter of a son (h.l.s.), full sister,

25 Ibid; Robertson Smith, Kinship, 85; Taybji, 836 (3rd. Ed.).
26 Ibid.

and consanguine sister. A residuary together with another is a female heir who becomes a residuary because of her co-existing with another female heir, as for example, a full sister with a consanguine sister. [27] In default of any residuary the residue returns to the sharers by consanguinity in proportion to their shares. If there is only one residuary he gets all the residue and if there is no sharer he gets the whole inheritance, a full blood takes precedence over half-blood and if he is related to the deceased on two sides he inherits in the dual capacity. [28] When a female becomes a residuary with a male she takes a one-half of the male irrespective of the distance in the degree of relationship, for the general rule of the Sharia is, that, the share of a female is one-half of the male.

3. DISTANT KINDRED

Distant kindred or *Dhawul-arham* are the relations who are neither a sharer nor a residuary and include all relations whether near or remote. The Shafii and the Maliki schools do not include such relations in the category of heirs at all, for Zaid, the son of Thabit (a companion of the Prophet had said, that "There is no inheritance for the distant kindred, but the property undiposed of is placed in the public treasury". The Hanafi doctors hold them as heirs. [29] The basis of the law may be attributed to the Quran which says, "And those who have believed afterwards and have fled and fought strenuously with you; these too are of you; but blood relations are nearer in kin by the Book of God. Verily, God all things doth know". VIII. 75 (Palmer's Transl.).

The distant kindred are divided into four categories. The first, are the descendants of the deceased who are the daughter's children, son's daughter's children (h.l.s.), the

27 Abdur Rahim, 348-49; Fatwai-Hindi, X. 427.
28 Fatwai-Hindi, X. 427.
29 Al-Sirajiyyah, 44 etsq; Fatwai-Hindi, X, 441; Abdur Rahim, 349.

second are the ascendants of the deceased, who are the false grandfather and false grandmother, the third are the descendants of the parents or descendants of the ascendants, the descendants of all types of brothers and sisters (except the the male descendants of full and consanguine brothers who are always residuaries), and the fourth grade consists of descendants of the ascendants (h.l.s.), who are either all types of paternal and maternal uncles and aunts and their descendants except the full and consanguine uncles and male descendants who are always residuaries, or the descendants of remoter ancestors who are not residuaries. The estate devolves on the first grade which excludes the other second grade and so on. It is to be noted that the issue of a female except the mother, whether male or female can never be a sharer or a residuary but remains always a distant kindred.[30]

As it has been said above there exists a difference of opinion among the jurists as to the inheritance of distant kindred. The fatwa is in favour of Imam Mohammad against the view of Imam Abu Yusuf and the Indian law is according to the views of Imam Mohammad. [31]

OTHER HEIRS

SUCCESSORS BY CONTRACT

In the default of above heirs, the estate of the deceased devolves upon a person with whom he entered into a contract upon an undertaking to pay fine, or compensation to which the deceased might become liable. Generally, it happens where the parentage of two persons is unknown and who enter into a contract of inheritance with each other are successors by contract according to the opinions of the two desciples though not according to Abu Hanifa. [32]

30 Ibid.; Ibid. 440; Ibid.
31 Baillie I. 716; Al-Sirajiyyah, 49-50.
32 Fatwai-Usmani, Kitabul-Mirath, 55; Ham. Hedaya, 517; Robertson Smith, 55 etsq.

Such a contract can be cancelled or rescinded, but not so, if the patron has carried out his part of contract.[33] Such a person does not inherit if there is either a husband or wife living. The right of inheritance by contract is based upon the Quran (IV. 33), and the traditions of the Prophet are to the same effect.

ACKNOWLEDGED KINSMAN

In the absence of the above heir, the estate devolves upon a person to whom the deceased had acknowledged as a relation through another. [34] The Shafii school do not recognize such a heir.

UNIVERSAL LEGATEE

A person to whom the deceased has left the whole of his property by will is called in the language of the law as a 'Universal legatee', and it also means the person to whom a deceased has left more than one-third share by will. [35] In the case of the presence of a wife or a husband, the legatee gets according to the will after deducting his or her share, but where there is none of the heirs, he gets more than one-third, though Imam Shafii holds that he cannot get more than one-third, and it is said that he is not a heir for he gets the estate under the law of will.

BAIT-AL-MAL

A *Bait-al-Mal* is a treasury of a Muslim state which has the responsibility of maintaining the orphans and the destitutes and carries out the duties of Sharia. Upon this principle, in the absence of all above the state takes the whole estate of the deceased by the law of escheat, in the modern times. [36]

EXCLUSION FROM INHERITANCE

The law recognizes three grounds of exclusion from

33 Ibid. 191; Ibid. 518.
34 Ibid. 194.
35 Ibid. 195; Wilson, S. 264.
36 Ibid. 200; Wilson, S. 26; see Article 296 of the Constitution of India, 1950.

inheritance, which are:

1. Homicide;
2. Difference of religion;
3. Slavery (with the abolition of slavery, this law has lapsed). (For India see Act V of 1850).

HOMICIDE

A person who causes the death of another person (except under an order of a competent authority), whether intentionally or negligently or by accident is totally debarred from inheriting the property of such a deceased person, but if the cause of death is an indirect one it is not a sufficient cause of exclusion. [37]

The origin of the doctrine is attributed upon a tradition of the Prophet which says that "There is nothing for a murderer from inheritance". There is conflict of opinion among the jurists upon the doctrine. According to the Shafii school all killing is an impediment even if it occurred by the exercise of self-defence or by carrying out the order of punishment of a competent court. The Hanbli school takes the view that the killing which acts as an impediment is that which is punishable either by fine or otherwise, for a punishment being a proof of a blameworthy conduct is a fit deprivation of inheritance. The view of the *Hanafi* school holds that the killing must be direct, while the Maliki school holds that the homicide must be a pre-meditated attack. [38]

DIFFERENCE OF RELIGION

The majority of jurists hold that a non-muslim cannot inherit a Muslim and vice-versa.[39] The difference of nationality or *Dar* or country is no impediment to inheritance among the Muslims, and hence if a muslim dies in an alien country, his son living in the home country

37 Baillie I. 707.

38 Prof. Abu Zahra, 165-166; Prof. Anderson in 42, The Muslim World, 128 (1952).

39 Ibid.; Baillie I. 708.

can inherit his estate and vice-versa. [40] In India the Sharia has been amended and a Muslim renouncing Islam is entitled to inherit from his Muslim relatives, though the judicial views take the position that a non-muslim cannot claim to inherit a relation who has been converted to Islam.[41]

THE DOCTRINES OF INCREASE AND RETURN

The Doctrine of Increase or *AUL*

The doctrine of increase applies when the total of shares exceeds a unity. It reduces the fractional shares to a common denominator and 'increasing' the denominator so as to make it equal to the sum of the numerators. The doctrine applies to all without exception.[42]

The Doctrine of Return or *RADD*

When after meeting the claims of the shares a residue is left and there is no residuary to receive, it reverts to the sharers (except to hushand and wife) in proportion to their shares, after it has been kept back while alloting the shares, hence it is called 'Return'.[43]

THE RIGHT OF REPRESENTATION

The principles of representation is not recognized by the Sunni or the Shia schools of law, and it is an innovation introduced by the English law. For example, if A had two sons one of whom died during the life time of A, the father, leaving several children, these children do not possess the right of reprensenting their father after the death of A but are excluded from inheritance by their uncle,[44] and this principle seems to be critical in relation

40 Ibid. 166; Baillie I. 708.

41 See: The Caste Disabilities Removal Act (Act XXI. of 1850);
See: K. P. Chandrase Kharappa V Govt. of Mysore AIR 1955 Mys. 26; Mohd. Abdul Aziz Khan V. Mahbub Singh AIR 1936 All. 202: 160 I. C. 48: (1936) All. 488.

42 See Al-Sirajiyyah, 29 etsq. for details.

43 Ibid. 37 et sq for details; Prof. Anderson in 42, The Muslim World, 46 (1952).

44 Ameer Ali II. 35: see Mahmud J. in Jafri Begum V. Amir Mohd.

to the modern conditions, but in Pakistan the gap has been filled up by legislation, while in the Middle East the Quranic provision of obligatory bequest has been made compulsory.

The right is said to be recognized to a very limited extent in the succession of the cognate relatives. For example, half-sisters and brothers on the mother's side, when they do succeed, take the mother's share in the inheritance.[45]

THE RIGHT OF A HERMAPHRODITE

The Sharia's subtle distinguishing eyes upon the nature of human physique provided the defined share of hermaphrodites, who are persons possessed of doubtful sex or who possessed parts of generation of both of a man and a woman. The general view according to Abu Hanifa provides that such a person shall have the share of a daughter. For example, where a man dies leaving a son and a daughter and a hermaphrodite, the latter has the share of the daughter. According to Abu Yusuf, the son will take one share, the daughter will share a half, and the hermaphrodite will be entitled to three-fourths of a share. The view of Muhammad holds that the hermaphrodite would take two-fifths of the estate, if a male and a fourth of the estate if a female, with certain other conditions. [46]

However, in views of the growths of modern medical science, and surgery, it is submitted that the provision regarding such persons has become out of date.

§ 3 The Shia Law of Inheritance

GENERAL

The Shia law especially of the Ithna Ashari school is somewhat different from the Sunni (Hanafi) school. That

Khan 7 All. 822 at p. 834 (1885); see Mulla S. 52; compare, Moolla Cassim bin Moolla Ahmad V. Moolla Abdul Rahim and others L. R. 32 I. A. 177 (1905).

45 Ameer Ali II. 35; for reasons of non-recognition of the right of representation upon the maxim "Nemo est hœres viventis" i. e. no one is the heir to a living person, see Dr. Jung in 31 A. L. J. 11 (1933).

46 Ham. Hedaya, 704; Al-Sirajiyyah, 59-60.

law does not make the artificial distinction between false grand-parents and the true grand-parents, and the distant kindred are totally unknow to it. Accordingly, only a *Nasab* or blood relationship and *Sabab* or special cause give rise to the right of succession.

NASAB OR BLOOD RELATIONSHIP

The law divides the heirs into :

Class I—(1) Parents;
(2) Children and other lineal descedants (h.l.s.).

Class II—(1) Grand parents (h.h.s.);
(2) Brothers and sisters and their descendants (h.l.s.).

Class III—(1) Paternal uncles and aunts and their descendants (h.l.s.);
(2) Maternal uncles and aunts and their descendants (h.l.s.).[47]

For the purposes of deciding the shares, the heirs are divided into, (1) Sharers who are nine in number, and (2) Residuaries, i.e. all heirs who are not sharers. The sharers, as a rule do not take priority over the residuaries, but get preference some-times.[48]

HEIRS BY SPECIAL CAUSE

(1) The husband;
(2) and the wife.

These special causes amongst others, though remain of academical interest only, are the spouses who inherit each other, though not entirely excluded from inheritance, and take their shares after the partition of the estate can take place among other heirs.[49]

The order of succession among the three classes of heirs depends upon the principles (1) that the first class excludes the second class and the second class excludes the third class from succession, and (2) by the order of preference among

47 Baillie II. 331 et sq; Tyabji. S. 640 et sq; Wilson, S. 450 et sq.
48 Ibid. II. 394.
49 Baillie II 261.

to the modern conditions, but in Pakistan the gap has been filled up by legislation, while in the Middle East the Quranic provision of obligatory bequest has been made compulsory.

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THE RIGHT OF A HERMAPHRODITE

The Sharia's subtle distinguishing eyes upon the nature of human physique provided the defined share of hermaphrodites, who are persons possessed of doubtful sex or who possessed parts of generation of both of a man and a woman. The general view according to Abu Hanifa provides that such a person shall have the share of a daughter. For example, where a man dies leaving a son and a daughter and a hermaphrodite, the latter has the share of the daughter. According to Abu Yusuf, the son will take one share, the daughter will share a half, and the hermaphrodite will be entitled to three-fourths of a share. The view of Muhammad holds that the hermaphrodite would take two-fifths of the estate, if a male and a fourth of the estate if a female, with certain other conditions. [46]

However, in views of the growths of modern medical science, and surgery, it is submitted that the provision regarding such persons has become out of date.

§ 3 The Shia Law of Inheritance

GENERAL

The Shia law especially of the Ithna Ashari school is somewhat different from the Sunni (Hanafi) school. That

Khan 7 All. 822 at p. 834 (1885); see Mulla S. 52; compare, Moolla Cassim bin Moolla Ahmad V. Moolla Abdul Rahim and others L. R. 32 I. A. 177 (1905).

45 Ameer Ali II. 35; for reasons of non-recognition of the right of representation upon the maxim "Nemo est hœres viventis" i. e. no one is the heir to a living person, see Dr. Jung in 31 A. L. J. 11 (1933).

46 Ham. Hedaya, 704; Al-Sirajiyyah, 59-60.

law does not make the artificial distinction between false grand-parents and the true grand-parents, and the distant kindred are totally unknow to it. Accordingly, only a *Nasab* or blood relationship and *Sabab* or special cause give rise to the right of succession.

NASAB OR BLOOD RELATIONSHIP

The law divides the heirs into :

Class I—(1) Parents;
(2) Children and other lineal descedants (h.l.s.).

Class II—(1) Grand parents (h.h.s.);
(2) Brothers and sisters and their descendants (h.l.s.).

Class III—(1) Paternal uncles and aunts and their descendants (h.l.s.);
(2) Maternal uncles and aunts and their descendants (h.l.s.).[47]

For the purposes of deciding the shares, the heirs are divided into, (1) Sharers who are nine in number, and (2) Residuaries, i.e. all heirs who are not sharers. The sharers, as a rule do not take priority over the residuaries, but get preference some-times.[48]

HEIRS BY SPECIAL CAUSE

(1) The husband;
(2) and the wife.

These special causes amongst others, though remain of academical interest only, are the spouses who inherit each other, though not entirely excluded from inheritance, and take their shares after the partition of the estate can take place among other heirs.[49]

The order of succession among the three classes of heirs depends upon the principles (1) that the first class excludes the second class and the second class excludes the third class from succession, and (2) by the order of preference among

47 Baillie II. 331 et sq; Tyabji, S. 640 et sq; Wilson, S. 450 et sq.
48 Ibid. II. 394.
49 Baillie II 261.

the heirs in each class, they take together and do not exclude each other.

The doctrine of representation is recognized to a certain extent in the Shia law, as for instance the paternal grand-parents get the share which the father if living would have taken.[50] The law recognizes the doctrine of Return, for instance in cases where after meeting the claim of the sharers a residue is left in absence of a residuary to receive it, such a residue is distributed among the sharers proportionately with some exceptions.[51] But the doctrine of increase is not recognized in the Shia law and so also is the case of the doctrine of Escheat.

An eldest son is given the right of primogeniture, but an illegitimate child or *Walduz-Zina* cannot inherit from either of the parents.[52] The muta wife is not considered as a heir, though there is a difference of opinion among the writers in cases of agreements for it.[53] The law requires a homicide to be intentional and unjustified in order to exclude a heir from succession.[54]

50 Baillie II. 284.
51 Ibid. 262.
52 Ameer Ali II. 128; Baillie II. 305.
53 Compare: Taybji, p. 121; Wilson, 458; Baillie II. 344.
54 Ameer Ali II. 127.

IX

The Laws of Gifts, Wills and Death-bedGifts

§ 1 Preliminary Observation

In the western systems, a unilateral juristic act as compared to a bilateral juristic act is one in which the will of only one party remains effective and operative.[1] A contract which has a unilateral juristic elements imposes an executory duty on one party alone, and the best illustration of it may be found in a will or testament and a gift or donatio, where the disposition of property is determined by the testator or the donor alone.[2] Though the refusal of the beneficiary may give rise to the failure of a will or gift, yet such disposition of property being a juristic act is a binding juristic act even before the beneficiary knows it. The essence of such dispositions is that they are gratuitous in nature, and always remaining so, are more or less equivalent to grants.[3]

A person by virtue of having dominion and ownership in his property may transfer to another his rights in relation to such property. He may sell his property or alienate inter vivos as gift or by way of will, without objection of another, for the property-right is essentially a guarantee of the exclusion of other persons from the use of the thing.[4] This principle is inherent in every civilized legal system and bears much significance in the jurisprudence of Islam.

In the Islamic Sharia, two kinds of dispositions are recognized, as a person may dispose of his property inter vivos without any limitation by way of gift, yet he is

1 Salmond, 348 (9th Ed.).
2 Paton, 371; Rabel, The Form of Wills, 6 Vand. L. R. 533 etsq (1953).
3 2 Blackstone Commentaries, 440.
4 Wigmore, Select Cases on the Law of Torts II. 858 (1912).

restricted to dispose of it by way of a bequest to only one-third in the interest of other heirs. It is a fundamental principle of the law that its policy prevents a testator interfering by will with the course of the devolution of property according to law among his heirs, for he may give a specified portion upto a third to a stranger, though he may defeat the policy of the law by giving in his life-time the whole or any part of his property to one of his sons, with the compliance of certain formalities. [5]

The basis of the law of gift (and wills) may attributed to the Quranic texts which relate to spending for parents, near relatives, orphans, the needy, etc. (see II. 215). The traditions of the Prophet similarly compliment the doctrine for the increment of mutual loves of human beings.

A gift as interpreted by its counterpart Hiba in the Sharia is a restricted but well-defined concept, than the wide generic English term 'gift' which is applied to a large group of transfers. The Islamic 'Hiba' in its literal sense signifies the donation of a thing from which the donee may derive a benefit, in the Sharia it means a transfer of property made immediately, and without any exchange, and the person who makes the transfer is called donor or *Wahib*, the person in whose favour it is made is the donee or *Mohoob-l-hoo*, and the thing itself is called 'gift' or *Mohoob*. [6] On the basis of the juristic distinction between the corpus or *Ayn* and the usufruct or *Manafa*, the principles of interpretation was developed that in every kind of voluntary dealings if the corpus was mentioned, it constituted hiba or gift, but if the usufruct, it was an *Ariyat*. [7]

5 Ranee Khujooroonissa V. Mt. Roushun Jehan 3 I. A. 291 (1876); see also Ameer Ali I. 33 etsq; see Mackintosh, Limitations on Free Testamentary Disposition in the British Empire, 12 J. Comp. Leg. & Int. L. (3rd. Ser), 13 etsq (1930).

6 Ham. Hedaya, 482; compare S. 122 of the Transfer of Property Act, 1882 (India)

7 Fathul-Qadir III. 666; Fatwai Alamgiri II, 523.

The general legal meaning of the term 'will' is the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. [8] In the Sharia it means an endowment of a right in property which is to take effect on the death of the person conferring the right. [9] The objects of a will may be lawful but not against public policy. [10] The general difference of a will from a gift is that in the latter possession is a necessary condition for validity while in the former it is not so. Further, a man cannot dispose of his property more than one-third by a testament, for, the rights of the heirs are to be regarded, unless they give their consent. [11] As death-bed gifts are similar to bequests, so like the latter they are held invalid in favour of an heir unless the other heirs give their consent after the death of the donor, [12] for, "The law cannot know individuals, nor accommodate itself to the diversity of their wants. All that can be required of it is, that it shall offer the best chance of supplying these wants.

8 S. 2 (h) Indian Succession Act 1925.

9 Ham. Hedaya, 67; compare, Rheinstein, Critique: Contracts to Make a Will, 30 N. Y. U. L. R. 1224 etsq (1955).

10 Fatwai-Hindi, IX 464 etsq; compare Articles 1131, 1133 of the French Civil Code holding a will as invalid on basis of the rule that "An obligation without cause or with a wrongful or illicit cause, can have no effect", for "A cause is illicit when it is prohibited by law, or when it is contrary to good morals or to public order".; Schlesinger, 378; see also, S. 138 of the German Civil Code; 1 Williston on Contracts S. 148 (3rd. Ed.) for American views.

11 Ham. Hedaya, 671; Baillie I. 615, II. 236; Bukhari, 23, 36; Mohd. Faiz Ahmad V. Ghulam Ahmad Khan 3 All. 490 (1881).

12 Ham. Hedaya 684; Baillie I. 551; compare The Inheritance (Family Provision) Act, 1938 restriciting freedom of testation, death-bed gifts under the English Law; see: Mannie Brown in 18 Can. B. R. 261 (1940); Laskin in 17 Can. B. R. 181 (1939); Kennedy in 20 Iowa L. R. 317 (1934-35); Keeton and Gower in 20 Iowa L. R. 326 (1935) for western judicial experiments; Ref. Paton, 448 for citations; see also the Intestates Estates Act, 1952 (England).

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It remains for each proprietor, who may and who ought to know the circumstances in which those who depend upon him will be placed after his death, to correct the imperfections of law in those cases which it could not foresee". [13]

§ 2. The Law Of Gift

DEFINITION

A gift or *hiba* is the conferring of a right of property in something specific, without an exchange. [14] It is a form of contract concluded by offer and acceptance which is said to be fulfilled when the possession is taken. [15] The Sharia treats it as a transfer of property (corpus of a movable or immovable existing thing) made immediately, without any exchange. [16] It is also called the transfer of the right of the property in the substance (*Tamlikul-ayan*) by one person to another without return or *Iwad*. [17] The three necessary conditions for a valid gift are, (1) the donor must declare it, (2) it must be accepted by the donee with, (3) the delivery of possession. [18]

DONOR'S CAPACITY

The person making a gift must be an adult, sane and owner of the thing given at the time when the gift is made. [19] The marriage of a woman is not an impediment to make a valid gift, though the presumption of understanding the nature of the transaction may not arise.

DONEE'S CAPACITY

A gift can be made to any person, natural and juristic who remains in existence with capacity of owning or holding property. In cases of a minor and a lunatic, the possession of the gifted property must be given to the legal guardian, but a gift in favour of an unborn person is not valid. [20] A gift can be made in favour of a mosque or charitable institution by way of *Sadaqa*. [21] As the law requires the identity of the donee, so if a gift is made to an unknown person it is held invalid.

13 Bentham cited by Wilson, 299.
14 Baillie 1. 515; Fatwai Alamgiri IV. 520.
15 Mahmasani in Law In the Middle East, 199 citing Articles 57 and 837 of the Majalla.
16 Ham. Hedaya, 482.
17 Ameer Ali I. 40; Fyzee, 187.
18 Ameer Ali I. 41, Tyabji S. 346; Fitzgerald, 201.
19 Baillie I. 516; Ameer Ali I. 53.

As all the dispuisitions relating to gifts and wills in the Sharia proceed on the assumption that the business is transacted by word of mouth, so a writing is not necessary for the validity of a gift of either movable or immovable property. [22]

MODE AND SUBJECT

A gift in order to be valid must have three essential conditions:

1. There must be clear and unambiguous intention of the donor to give immediately a property without consideration and it must be manifested by actual tender of the subject of the gift to the donee.
2. The donee must accept the gift.
3. Delivery of the possession of the subject to the donee. [23]

1. DONOR'S IMMEDIATE TENDER OF THE SUBJECT OF THE GIFT TO DONEE

In order to constitute a valid gift, it is necessary that the donor must have bonafide intention of divesting himself in presenti of his title in the gifted property, for a gift cannot he made to take effect at any future period of time,

20 Tyabji, S. 397; Wilson, 323.
21 Ibid. S. 363.
22 Wilson, 323; see S. 129 of the Transfer of Property Act, 1882 regarding the exclusion of the Act relating to gifts made under the Islamic law.
23 Ham. Hedaya, 482; Mohd. Abdul Ghani. V. Fakr Jahan Begum 49 I. A. 195 (1922); Amjad Khan V. Ashraf Khan 56 I. A. 213, 218-19 (1929); Ameer Ali I. 41; Baillie I. 515.

otherwise it is a nullity in the eyes of the law. [24]

A gift depending upon a condition or with a restriction as to use and disposal is invalid, unless such a condition can be fulfilled immediately. [25] Where a gift is made and a condition is attached to it, the condition is void but the gift is valid, as for example, A gives a house to B as gift and attaches a condition that the latter will have no right to sell it, the gift is valid but the condition is void. [26] As the basic condition of a valid gift is the immediate tender of the thing, a gift if dependent upon any contingency or happening of a particular thing is of no effect. For example, if A says to B "If Zaid enters this house my house is yours". Here though Zaid enters the house the gift is void. [27] Under the Shia law a condition can be validly attached to a gift and the donee so takes it. [28]

2. DONEE'S ACCEPTANCE

Unless the donee accepts the gift, no title passes in respect of the gift from the donor to him, and so the donee must accept the gift either expressly or impliedly. In cases where a gift is made by the father to his minor child, and in cases where a creditor releases his debt without the consent of the debtor, no need of acceptance arises. [29] The Shia law holds the validity of the gift upon mere declaration of the donor by its delivery to the donee though the object was in his possession. [30]

3. DELIVERY OF POSSESSION

There is a conflict in the opinion of the jurists as regards the delivery of possession of a gift. Some of the Maliki school hold that it was not necessary and a contract

24 Baillie I. 516.
25 Majma-ul-Unhar III. 366; Kamila Tyabji, 28.
26 Ham. Hedaya 484; Baillie I. 517.
27 Baillie I. 516; Tyabji. S. 349; Wilson, 533.
28 Baillie II. 226-227.
29 Ibid,; Baillie I. 531.
30 Ameer Ali I. 114 (3rd Ed.); Baillie II. 204.

of gift is complete upon mere offer and acceptance among the parties. The other schools of the Shafii and Hanafi jurists hold that a gift becomes effective upon the delivery of possession. [31] It is argued by the Hanafi jurists that gifts are voluntary deeds and if a right of property were established in them previous to the seisin, it would follow that the delivery would be incumbent on the voluntary agent before he had voluntarily arranged for it. [32] However the general consensus is in favour of delivery of possession and this view was adopted in the Majalla's Ariticles 57 and 837 where a gift was fulfilled only when possession thereof was taken, though the words of gift are not entirely ineffective. [33] The English law comes close to Sharia when it holds that an oral gift without delivery of possessiod would be no gift at all. [34]

EXCEPTIONS OF DELIVERY OF POSSESSION

When the subject of gift is in the hands of a responsible person, delivery of possession is not essential as the gift is valid by acceptance and possession. Such cases are:

1. Where the gift is in favour of a bailee and the subject of the gift is already in the donee's hand as a pledge;
2. the thing is with the donee as deposit, trust or loan;
3. the subject is in the possession of a usurper or tenant;
4. gifts made by a father to his minor child;
5. gifts made by a mother to her infant child whom she maintains in absence of the father; and

31 Mahmasani, 199 citing Sarakhi Vol. 12, 48; Mahmasani Vol. 2 p. 18 etsq; Ghazzali I. 249; Durrul-Mukhtar, 457.
32 Ham. Hedaya, 482.
33 Mahmasani, 199; Fathul-Jalil, 395; Abdur Rahim,298; Ham. Hedaya 483; Ameer Alli I. 41.
34 Cochrane V. Moore 25 Q.B.D. 57 (1890); Irons V. Smallpiece 2 B & Ald. 551 (1819).

6. gifts made by a legal or defacto guardian to his ward. [35]

In cases of gifts by a husband and wife and vice versa, certain formalities were essential according to the classical law of Islam, but during course of time the rule was recognized that a gift by the husband to the wife does not require actual taking of possession but a declaration by him by handing over the deed to her was sufficient and similar was the position when the donor and the donee were closely related and living in the same property. [36]

The subject of gift must be in existence at the time when the gift is made, and anything which is included in *Mal* or a property with dominion and possession can be gifted. [37] Upon this basis of the law, a gift of a property in the possession of an usurper, a pledgee, and a tenant is not valid. [38] But however, the Indian courts have held otherwise of the Sharia. [39] A debt can be a subject-matter of a gift under *Istihsan* and similar is the case of release of it by way of extinction, for the Hanafi school holds that a gift of an incorporeal right is valid and complete if the donor has done all to put the donee in a position to get the benefit of the right gifted by divesting himself of all signs

35 Baillie I. 522; Ham. Hedaya 522, 484, 584; Fatwai-Alamgiri IV. 546; Bahr-ur-Raiq VII. 313; Durrul-Mukhtar 635.

36 Tyabji, S. 401; Ameer Ali I. 115 et. sq. approving Amina Bibi V. Khatija Bibi 1 Bom. H. C. R. 157 (1864); Fyzee, 200-201; MaMi V. Kallander Ammal 54 I.A. 23 (1926); Mohd. Sadiq V. Fakhr Jahan 59 I. A. 1, 13 (1932).

37 Bailiie I. 516; compare: Perrin V. Morgan 1943 A.C. 399 regarding the meanings of 'money' in the English Common Law; see Mulla, The Transfer of Property Act, p. 715-16.

38 Baillie I. 527 etsq.; Ham. Hedaya, 484; Bahrur-Raiq VII 313; Durrul-Mukhtar, 635; Fatwai-Alamgiri IV. 546.

39 See: Mohd. Bakhsh Khan V. Hosseini Bibi 15 Cal. 684 (1888); Abdur Kabir V. Jamila Khatoon 1951 Pat. 315; Ismail V. Ramji I. L. R. 23 B. 682; Sheikh Ibrahim V. Sheikh Suleman 9 Bom. 146; Hassan Ali V. Ruhullah 1925 B. 305.

of title to the property. [40] But it is to be noted that a gift of *Mashghool* (i. e. a thing which is occupied by another) as the case of milk in the jug, alone is not lawful. The reason of the rule is that the subject-matter of the gift is possessed by another thing and unless it is gifted along with the thing which occupies it, and further a valid gift of a thing which occupies another thing cannot be made, without gifting the thing which is occupied by it. The thing which is gifted being occupied with the property of the donor prevents the taking of possession, which is necessary to the completion of gift, but that the thing given occupying the property of another cannot have that effect. For example, if A make a gift of his mansion without the effects which are in it, the gift will be invalid, but if he gifts the mansion along with the effects in it, such a gift will be a valid gift. [41] Upon the same principle a gift of an article implicated in another, for example, the gift of wool on the back of a sheep is unlawful because the conjunction of the thing given with what is not given is a bar to the seisin. [42]

MUSHA

The view of the Hanafi school is narrower than other schools as regards the nature of possession to be given. It holds that the possession to be delivered must be separate and exclusive to hold the gift valid and effective. [43] The Shia and the Shafi schools hold that a thing which can be capable of division and subject of sale can validly be subject of gift and so they do not recognize the objection on the ground of *Musha*. [44]

A Musha is an undivided share of a movable or immo-

40 Baillie I. 528 etsq.

41 Baillie I. 528 etsq.

42 Ham. Hedaya, 484; compare S. 124 of the Transfer of Property Act, 1882 on a gift comprising of future property as void.

43 Abdur Rahim, 298.

44 Baillie II. 205 etsq.; Minhaj 234; Ham. Hedaya 483.

vable property which cannot be partitioned without destroying its utility like a horse, tree, etc. and it cannot be a subject of a valid gift, for the property of which it is a part, is capable of division. [45] The reason of the rule is explained in the Hedaya which says that if such a gift is held valid before the transfer of possession, "it would follow that a thing would be incumbent upon the giver which he had not engaged for - namely, division which may possibly be injurious to him ..... It was otherwise with respect to articles of an indivisible nature; because in these complete seisin is impossible, and hence an incomplete seisin must necessarily suffice, since this is all that the articles admit of, and also because in this instance the donor does not incur the inconvenience of a division". [46] The other schools objected to the distinction between divisible and indivisible articles on the basis that in the case of the latter also the donor incurred an inconvenience in sharing the property and hence it should also be invalid, but the Hanafi school replies that, "The donor is subjected to a participation in a thing which is not the subject of the grant, namely the use (of the whole indivisible article) for his gift related to the substance of the article not to the use of it—hence the necessity of a participation is not incurred by him with respect to the thing which is properly the subject of the grant". [47] It is of an interest to note that in the case of Mohd. Bakhsh V. Hosseini Bibi, [48] the learned judges by relying upon Macqnaghten (P.P.M.L. Case XIII) and upon, Ameena Bibi V. Zaifa Bibi, [49] held that it appears to be settled by Muhammadan Law, that if there are two sharers in the property, one may give his share to the other before division. It is submitted that

45 Ham. Hedaya, 483; Baillie I. 523; Fatwai-Qadi Khan, IV. 174.
46 Ham. Hedaya, 483; Ibid.
47 Ibid.
48 I. L. R. 15 Cal. 684 P. C. (1888).
49 3 W. R. 37.

had the rule of Hedaya and Baillie been brought to the notice of the judges, the decision might have been otherwise.

However a share in property which cannot be partitioned without loss of its utility can be subject-matter of a valid gift. [50] The gift of a thing which is capable of division jointly in favour of two or more persons is held invalid according to Abu Hanifa, but valid according to his desciples on the ground that in such a case the donor gives the whole of the thing to each of the donees, without any confusion. [51] But whatelse be the subtelity of distinction in the views of the jurists, it is an accepted fact that the doctrine of Musha is wholly unadapted to a progressive state of society and so ought to be confined within the strictest rules. [52] Upon the basis of this principle, the judicial views of India have held that an undivided share in property capable of division is valid, if subsequent to the gift, the property is partitioned and the share is given to the donee, where a gift is made by one co-heir to another, where the gift is of a share in a company, and the like. [53] These cases seem to be directly against the strict Sharia law, yet its original rigidity has been much relaxed. But however, the Sharia itself allows the devices to avoid the doctrine of Musha in order to mitigate the rigours of the law. For example, if a person who wants to gift one-half share of his house to a person may first sell it to him and then make a gift of the unpaid price to him. [54] But still the courts have held that

50 Ham. Hedaya, 483; Baillie I 523.
51 Ham. Hedaya, 485; Baillie I. 425.
52 See: Muhammad Mumtaz V. Zubaida Jan 11 All. 460 (1889): 16 I.A. 205.
53 See: Hamid Ullah V. Ahmad Ullah 1936 All. 473; Mohd. Bukhsh V. Husseini Bibi 15 Cal. 684 (1888); Ibrahim Goolam Ariff V. Saiboo 34 I. A. 167: 9 Bom. L. R. 872; Ameeron Nissa V. Abadoon Nissa 2 I. A. 87: 15 B. L. R. 67 P. C.
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the gift must fail for the fact that a simple device could have carried out the intention of the donor and is of no consequence.[55]

LIFE-ESTATE AS GIFT

The idea of a gift in Sharia is transfer of the corpus or *Ayn* of a thing to the donee. The words of gift show an intention on the part of the donor to transfer his entire rights and if a word imposes any restriction or limitation upon the full ownership of the thing, it would be a surplus-age and according to the Hanbli and the Shafii schools such a gift would be of a fee simple.[56] While if the words of gift relate only to the usufruct or *Manafi* of the thing, it would be a loan or *Ariyat* in the law. For example, when the donor says 'this house of mine is for thee as a gift by way of residence'. The Hanafi theory holds that when a gift is made to a person for his lifetime only, the gift is valid and the condition is invalid, and the donee becomes an absolute and full owner of the property.[57] The Maliki theory holds that a life-estate can be created by an inter-vivos gift and so also the donor may reserve the usufruct or use of a thing for himself for life or for a limited period of time and subject thereto make a gift of it.[58] The Shia schools also hold that a valid and binding condition can be attached to a gift as to make it for a person's lifetime which is called *Amree*.[59]

It is of an interest to note that the Sharia makes the above distinction with the creation of successive life interests. Upon the validity of non-religious family wakfs coupled

779; Majma-ul-Unhur II. 357; see Ahmadi Begum V. Abdul Aziz AIR 1927 All. 345: 100 I. C. 644.

55 See: Ahmad Hussain V. Qamarul-Zaman AIR 1927 Lah. 413: 102 I. C. 829.

56 Abdur Rahim, 300.

57 Ibid.; Ham. Hedaya. 489.

58 Ibid.; Fathul-Jalil, 396-400.

59 Baillie II. 226.

with the recognitions of the Shia and Shafii schools of the law, the attention is attracted to the fact that the particular concept is not totally alien to the Islamic Sharia. The recognition of the recurring rights as a subject of gift through the law of *Iwaz*, seems to bring the Hanafi closer to the Shia theory. A limited and life interest could be created as usufructuary bequests, and a series of such interests could be created as wakf in perpetuity by replacement, and further such an interest could also be created, for consideration as *Ijara* though the Hanafi theory was against its continuation after the death of either of the party, and as a whole, it is submitted, that the views of Sharia are to be keenly analyzed by the scholars of the jurisprudence of Islam.[60] The courts in India, irrespective of the positions of the law in other Muslim countries have kept in view the differences between the various schools though often with confusion. Yet, it is a matter beyond the the scope of the present subject as it will be better to study the law in the text-books of the substantive portion of the Islamic law.[61]

REVOCABILITY

It is a fundamental principle of the Sharia law of gift

60 See: Kamila Tyabji, 143 etsq.

61 For details see: Nawab Umjad Ally Khan's case 11 Moo. I. A. 517 (1867); Amjad Khan V. Ashraf Khan 56 I. A. 213; Sardar Nawazish Ali Khan's case 75 I. A. 62 (1948); Nathu V. Rafiq Mohd. 270 P.L.R. 1913; Siraj Hussain V. Mushaf Hussain AIR 1922 O. 93; Hanuman Sahu V. Abbas Bandi Bibi 120 I. C, 387; Alima V. Amandi Beari AIR 1930 Mad. 510; Sartaj Fatima V. Mohd. Jawaid AIR 1931 O. 6; Achiruddin Ahmad V. Sakina Bewa 50 C. W. N. 59; Ghulam Hussain V. Fakir Mohd. 48 B. L. R. 733; Mohd. Abdul Ghani V. Fakhr Jehan Begum 44 All. 301; Mohd. Abdul Ghani V. Fakhr Jahan Begum AIR 1922 P. C. 281: 49 I. A. 195; Mahomed V. Kairum Bivi 67 M. L. W. 413 (1954); and some to-date cases; see also Tyabji, Ss. 366 A. 408 etsq; Ameer Ali I. 134 etsq; Mulla, S. 55 etsq; Wilson, S. 313 etsq; Fyzee, 209 etsq; Verma, Mohd. Law 403 etsq (1953).

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that it may improve the mutual relation of human beings for love and affection, and upon this basis the tradition of the Prophet was much against the revocation of a gift.[62] In the Hanafi school a gift being a disposition of property without consideration can be revoked by the donor even after possession has been given to the donee, although it is held abominable morally.[63] Under the Shafii law, only a father or an ancestor has power to revoke a gift which has been made in favour of a child or other descendant provided that the donee has not irrevocably disposed of the thing received in gift.[64] The Shia schools maintain the view that a gift to any blood relation whether within the prohibited degrees or not, is irrevocable and if any gift is revocable, it can be done so by a mere declaration.[65] The Maliki school holds that a revocation after the delivery of possession is not permitted under the law.[66]

The Hanafi law requires the order of a competent court to revoke a gift, and till the passage of the order, the donee may use and dispose of the subject of the gift, and further the judge has certain discretion while passing such an order.[67] The right of the donor to revoke a gift cannot be relinquished, though if it is compounded for something it is dropped.[68] However, the Hanafi school accepting the disapproval of the revocability of a gift provided certain exceptions to the general rule, and under such a condition a gift cannot be revoked. Thus such irrevocable gifts are:

1. When the gift has been made in favour of a person

62 See: Mohd. Ali, Manual of Hadith 330 (No. 12); Bukhari IV Ch. XXX; K. Tyabji, 14.

63 Abdur Rahim, 301; Ham. Hedaya 485; Baillie I. 533; Ameer Ali, I. 150; compare S 126 of The Transfer of Property Act, 1882.

64 Minhaj, 235; Tuhfatut Minaj, II. 345; Nailul-Maarib II. 10; Abdur Rahim, 303.

65 Baillie II. 205.

66 Fathul-Jalil, 401.

67 Baillie I. 537.

68 Baillie I. 537.

related within the prohibited degrees of relationship to the donor, provided the prohibition is based upon consanguinity, such as the ascendants or descendants, brothers, or sisters or their children, uncle or aunt;

2. When the gift is made during coverture to the husband or the wife;
3. When the donor has received any return or consideration for the gift from the donee or a third person;
4. When there has been an incorporation of an increase with the gift, so that no revocation could be made without including the increase;
5. When the subject of the gift has been changed;
6. When the thing had been lost or destroyed;
7. When the gift is of the debt to the debtor himself;
8. Where the donee has died;
9. Where the donor has died; and,
10. Where the gift has been made to charity or *Sadaqa*.[69]

When a gift is unable to be retracted on account of prohibited relationship, the law makes no difference whether the donee is a muslim or a non-muslim, and if the donee has alienated only a portion of the gifted property, the law permits the donor to revoke the remainder.[70]

OTHER FORMS

A simple hiba or gift may be distinguished from a gift for an exchange or *Hiba-bil-Iwaz*, and from a gift on condition of an exchange or *Hiba-ba-Shartul-Iwad*.

69 Baillie I. 534-536; Ham. Hedaya 486; Abdur Rahim, 302; Al-Majalla, 136-7; Ameer Ali I. 156 et sq; Tyabji, S. 424 et sq; Abdur Rahman, Institutes of Musalman Law, Articles 450-64; Wilson, S. 316; Fyzee, 224.

70 Baillie I. 534 et sq.

HIBA-BIL–IWAZ

When a gift is made it remains optional for the donee to make a reciprocal gift and declare his intention for such a consideration of the gift he received. This reciprocal gift is called hiba-bil-iwaz, and if the iwaz or the return is accepted, the first gift becomes irrevocable for the whole transaction becomes a gift with return. In order to complete such a gift there must be an unconditional offer, an unqualified acceptance with delivery of possession. [71] Some modern writers hold it as a sale upon the basis that there is a difference of its Indian form from the classical form. [72] But other views contend that it is not a sale nor an exchange, for neither a gift can be rejected on account of defect nor it is exposed to the right of pre-emption. [73]

However, the classical jurists by their foresight and wisdom placed some hurdles as of Musha or delivery of possession for the validity of a simple gift.[74] To avoid such hurdles subtle lawyers in India began to gift properties with an outward form of exchange or sale. The Indian form differed from the original, that in it there was only one act, the iwaz or exchange being involved in the contract of gift as its direct consideration, and so in reality it was not a proper hiba-bil-iwaz but a sale or exchange, where the delivery of possession is not required as in gift, and an undivided share in property capable of division may lawfully be transferred by it.[75] As there is the confusion of the two forms, all depends upon the

71 Baillie I. 543.

72 Fyzee, 228.

73 Baillie I. 543.

74 For classical views see: Fatwai-Almgiri IV. 554; Jami-ush-Shittat, 392; Qadi Khan IV. 187.

75 See Ameer Ali J. in Hitendra Singh V. Maharaja of Darbhanga 55 I. A. 197, 204-5 (1928); for the Indian form see: Mohd. Faiz Ahmad Khan V. Ghulam Ahmad Khan 3 All. 490 (1881) ; see also Baillie I. 122.

facts of a particular case to decide as to which form a particular transaction belongs.

HIBA-BA-SHARTUL-IWAZ

A *Hiba-ba-Shartul-Iwaz* must be distinguished from a hiba or gift on receiving something in exchange which is generally called *Hiba-bil-iwaz.*[76] For example, A gifts a house to B receiving from B a ring in return without making the exchange a condition of the gift. Here the only effect of the exchange would be to prevent the revocation of the gift, otherwise the transaction has all the incidents of a simple gift.[77]

In such a transaction the delivery of possession is essential for its completion and similar to a gift, it is not valid in Musha of anything that admits of partition. After the transaction is completed, it has the effect of sale, being irrevocable in nature and attractive of the right of pre-emption.[78]

§ 3 The Law of Wills

THEORY AND DEFINITION

A will (*Wasiyat*) or bequest is defined as a transaction to come into operation after the testator's death. In other words, when a person should say to another, 'give this article of mine, after my death, to a particular person', he is said to make a will. This will means an endowment of a right in property which is to take effect on the death of the person conferring the right.[79] The basis of the law is found

76 Abdur Rahim, 303.

77 Ibid.

78 Baillie I. 543; Tyabji, S. 407, 410, 417-19; for a fine comparison and discussion of the three forms (hiba, hiba-bil-iwaz and hiba-ba-Shartul-iwaz) see: Sarif-ud-Din Mahomed V. Mohi-ud-Din Mahomed 105 I. C. 67: 54 Cal. 754: 31 C. W. N. 1008: AIR 1927 Cal. 808.

79 Ham. Hedaya 670; compare S. 2 (h) of the Indian Succession Act of 1925; Buckland, Text-Book of Roman Law, 334 (2nd. Ed); Rheinstein, Critique: Contracts to Make a will, 30 N Y. U. L. Rev. 1224 et. sq (1955).

in a tradition of the Prophet specifying the disposition of one-third of a property.[80] The testator is called *Musi*, the legatee is called *Musalahu* and the executor is called *Wasi*. Its object is said to be as "..... a divine institution since its excercise is regulated by the Quran. It offers to the testator the means of correcting to a certain extent the law of succession, and enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognizing the services rendered to him by a stranger, or the devotion to him in his last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs".[81]

According to analogy a bequest is unlawful, because it signifies an endowment with a thing in a way which occasions such endowment to be referred to a time when the property has become void in the proprietor, and as an endowment with reference to a future period is unlawful, supposing even that the donor's property in the article still continues to exist at that time, it follows that the suspension of the deed to a period when the property is null and void is unlawful, a fortiori.[82] The juristic equity having regard to men's spiritual wants in the next life, has sanctioned it to enable the testator to make up for his short-comings during this life in good and pious works, and also a man's rights in his property are not totally lost on death but subsist in shapes of his burial and the payment of debts. It is valid by this principle being based upon the Quran and the traditions of the Prophet.[83]

80 Mohd. Ali, Manual of Hadith 334-5 No 2; Ameer Ali, I. 569; Abdur Rahim, 310.

81 Ameer Ali, I. 569.

82 Ham. Hedaya 670; Inaya IV. 559.

83 Abdur Rahim, 310-11.

Note the view of Mirabeau about a testament, that, "It is the

TESTATOR

Any person who is major and of sound mind can make a will, and according to the Shia schools a peson who has taken poison or wounded himself to commit suicide cannot make a will.[84] A will may be oral or in writing and if the intention is clear it is valid irrespective of form.

Anything in existence at the time of death of the testator and which is capable of ownership and transferable is a fit subject for a will. A will of a life-estate is lawful under the Sharia, for if a person bequeathes the use of his house either for a definite or an indefinite period, such a bequest is valid, and similar is the case of the will of the rent of the house, for such terms.[85] But if in such a case, the legatee dies before the expiration of the limited term, the property does not devolve upon the heirs of the legatee but reverts to the heirs of the testator.[86] It is lawful for a person to make

expression of the will of a man who has no longer any will, respecting property which is no longer his property; it is the action of a man no longer accountable for his actions to mankind; it is an absurdity, and an absurdity ought not to have the force of law": quoted in Rational Basis of Legal Institutions, 453 and cited by Paton, 449, and ccmpare it with Ameer Ali, who citing Sautayra says that, "A will from the Mussulman's point of view is a divine institution, since its exercise is regulated by the Koran. It offers to the testator the means of correcting to a certain extent the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods, and of recognizing the services rendered to him by a stranger, or the devotion to him in the last moments. At the same time the Prophet has declared that the power should not be exercised to the injury of the lawful heirs": Mohd. Law, I. 569; see also Ham. Hedaya, 671; Sale, Koran (Trans.) Sect. VI.

84 Ham. Hedaya 673; Baillie II. 232; see Mazhar Hassan V. Bodha Bibi 21 All. 91 P. C. (1898): 25 I A. 219; French Civil Code (Article 901) says, 'To make a donation inter vivos or a will, one must be of sound mind" .... Cf. David & Vries, 131.

85 Ham. Hedaya 692; Fatwai-Hindi IX. 515 etsq.

86 Ibid. 693.

a will that something be given out of his estate after his death if certain circumstances exist or if certain disqualifications are found in the legatee.[87]

LEGATEE

A will can be made in favour of any person, natural or legal who is capable of receiving and owning property, and hence upon this principle a bequest in favour of a non-muslim and in favour of a faetus in the womb of a woman is valid provided the birth takes place within six months from the date of the will. [88] A will in favour of a murderer is void as held by all schools of law similar to a gift. But a will in favour of a heir remains invalid unless the other heirs give consent to it after the succession has opened. [89] Under the Shia law a person may make a will to a heir without the consent of the other heirs, so long as it does not exceed one-third share of his property. [90]

LIMITATION

A will to any amount exceeding the third of the testator's property is not valid unless the heirs consent to it. [91] The rule is based upon the tradition of the Prophet which is attributed to Abu Wakas. [92] The reason of the rule of one-third is that the rights possessed by others are affected thereby, for the moment a man is seized of death illness his heirs acquire a right to his property which becomes mature after the death of the testator, the law also requires that a will must be for the benefit of the non-heirs alone, and further if it is made in favour of heirs, it may defeat the policy of the law which has fixed a portion of each in the inheritance. [93]

87 Fatwai-Hindi IX. 469.
88 Baillie 1. 624 635; Ham Hedaya 673-4.
89 Ham. Hedaya, 671; see Khajooroon Nissa V. Rowshan Jehan 2 Cal. 184: 3 I.A. 291.
90 Baillie II. 244; Mulla, 116 (15th Ed, 1961).
91 Ham. Hedaya, 671.
92 Ibid.; Muhd. Ali, Manual of Hadith, 334 et sq; Fitzgerald, 167.
93 Abdur Rahim, 311; Tyabji, S. 579; Fyzee, Ismaili Law of wills, 25-6

The Hanafi schools maintains that the consent of the other heirs is strictly regarded as a waiver in cases where a will exceeds the limit of one-third, as it removes the bar in the way of such disposition due to the existence of their rights. The Shafii school holds it as a transfer by the heirs of their property because such a consent is the cause of the will taking effect. So the former school holds that the heir legatee in whose favour the waiver occurred derives his title from the deceased, while the latter holds that he derives his title from the heirs who gave their consents. [94]

If a person makes a will of more than one-third of his property, or makes a bequest in favour of a heir and the other heirs do not consent to it, the legacy abates proportionately otherwise if they give their consent, it is valid, and further the consent of the heirs must be given after the death of the testator. [95] But if some of the bequests are for pious purposes expressly ordained in the Quran, while others are for pious purposes not expressly ordained, the rule of the law holds that the former will take precedence of the latter, and the latter bequests will be satisfied in the order in which they follow each other in the will. [96] According to the Shia schools a consent given during the lifetime of the testator is enough to validate a will bequeathing more than one-third share of the property, and upon this principle an individual may bequeath all his property in favour of heirs after he has obtained the consent of other heirs during his own lifetime, and if the bequeathed share is only in excess of one-third and the heirs were not completely excluded, there will be a rateable distribution of legacy. [97]

(for Fatimid law).
94 Ibid. 311-12; Durrul-Mukhtar, 595.
95 Baillie I. 624; Ham. Hedaya 676,
96 Wilson S. 271; Baillie I. 642-43; Ham. Hedaya 688; Ameer Ali I. 523.
97 Baillie II. 244; see also Fahmida V. Jafri 30 All. 153 (1908)

REVOCATION

A testator has unrestricted power to revoke, alter or modify his will at any time in his life, and a revocation need not be express for it may be implied in many cases. [98] As a legacy establishes the property in the legatee denovo, and does not vest by succession and descent as in inheritance so a legatee is at liberty to refuse a legacy as no person can be made a proprietor against his will. [99] Under the Shia schools if a legatee dies without giving his consent to a legacy in his favour, the acceptance is not implied and the right to assent or disclaim descends upon the heirs of the legatee. [100]

If there are many bequests, one does not abrogates another unless it contains something which shows a retraction of a preceeding one and a modification of the bequest in accordance with the most recent one. [101]

MANDATORY BEQUESTS [102]

If a person has relatives who are poor, and who are not his heirs, the Sharia makes it obligatory for such a person to use his option to bequeath for such poor relatives, out of some portions of his property. It is a religious obligation to be performed upon option. The necessity of it is mentioned in the Quran (II. 180-182, IV 8-9), which shows that even a court of law upon noticing that a bequest is made to strangers, while there are more deserving relatives, can transfer the bequest from the outsiders to the poor relations. [103]

Hussaini Begum V. Mohd. Mehdi 49 All, 547 (1927).

98 Baillie I. 629; Ham. Hedaya 674; Tyabji S. 599 (4).

99 Ham, Hedaya 673; Baillie I. 624.

100 Baillie II. 230.

101 Prof. Abu Zahra in Law In the Middle East, 177.

102 Ibid. 177.

103 Ibid; especially for the issue of a pre-deceased son or daughter cf. Prof. Anderson in 42, The Muslim World, 46 (1952).

INTERPRETATION

A Muslim bequest first of all must be construed according to the provision of the Islamic law, upon a view of social conditions and circumstances. The cardinal principle is to ascertain the intention of the testator with a construction in favour of validity of the will. [104]

EXECUTOR

Under the Sharia especially of the Hanafi school a testator can appoint an executor or *Wasee*, whose kinds are enumerated as proper and efficient, proper but inefficient, or improper. [105] The Qadi can remove the inefficient and appoint his helper or another man. [106] The law lays down the duties and powers of the executor, but in India all these matters are now regulated by the statutory law. [107]

§ 4 The Law of Death-Bed Gifts

GENERAL

It has been said that the disposition of property by an individual suffering from death-illness or *Mardu'-mawt* remains of a twin character, for it may have some characteristics of a gift mixed with some of will. [108] The reason of the rule may be said that the mind of the sufferer is attached to the property and upon his conscience. It is due to the fact of the fear that the ill person might dispose of his property in a way to injure his creditors, and because of the fear that he might injure the heirs by giving his property away to strangers, thereby deprive the heirs of all or part of their inheritance, and for these reasons the creditors and the heirs are entitled to prevent the execution of the actions

104 Abdur Rahim, 315; Tyabji S. 599; Fyzee 312.

105 Ham Hedaya 700; Fatwai-Hindi IX. 539.

106 Baillie I. 676.

107 See: The Indian Sucession Act 1925; The Probate and Administration Act, 1881.

108 See Snell, Equity 298 (22nd Ed.); Fyzee, 313-14.

of the man who has undertaken such injurious actions and who dies from such illness. [109]

MARDUL-MAWT

The death-bed illness or mardul-mawt means a malady which induces an apprehension of impending death in the mind of the person suffering from it and which actually results in his death. [110] If the disease is of long continuance, it is not a mardul-mawt for the familiarity with the disease has been developed to save it from death-illness. However no hard and fast rule can be laid down and to decide whether or not a particular gift was made in such a disease is dependent upon facts and circumstances of each case.

GIFT MADE IN DEATH-BED

If a person on his death-bed gives as a gift a part of his property to another, the law considers it as a bequest which takes effect to the extent of a third of his estate, after payment of funeral expenses, debts, etc. unless the heirs of the person give their consent after the death of the donor, to the excess.[111] A remission of the dower debt by the wife to her husband during such illness is to be treated as a bequest.[112]

As in the Shia law a will in favour of a heir to the extent of one-third of the estate is valid, a gift on the death-bed to the same extent is valid without the consent of the rest of the heirs, but it is otherwise in the Ismaili

109 Prof, Abu Zahra in Law In the Middle East, 162 et sq.

110 See Tyabji. 372 (3rd. Ed.); see also : Sakina Bibi V. Hafizud-Din AIR 1941 Lah 58; Hassarat Bibi V, Golam Jaffar 3 C. W. N, 57 (1898); Ibrahim Goolam Ariff V. Saiboo 34 I. A. 167, 177 (1907); for a critical analysis of the law with translations of original Islamic authorities levelled against the translations of Baillie 1st Ed. 543, 2nd Ed. 552 and Ameer Ali I. 53 cited in Fatime Bibi V. Ahmad Baksh I L. R. 31 Cal. 319, 327 (1903), see, Mahmed Yusoof, The Law of Marzulmaut, 1 Cal. L. J. 107n-136n (1905), Mohd. Law III 391-392 for Kazi Khan.

111 Ham. Hedaya, 685; Baillie I. 551,

112 Baillie I. 551.

law of the Shia schools.[113]

The law goes further and holds that if such a person seeks to confer an advantage on another person under the colour of a sale or purchase on terms which are unfavourable to himself still, the transaction is regarded as a bequest to the extent of the conferred advantage and is subject to the same restrictions of a bequest, provided in the case of competition between a disguised gift of this nature and an undisguised death-bed gift or an ordinary bequest, they do not abate rateably, but preference must be given to the former.[114]

OTHER TRANSACTIONS

If a person validly acknowledges a debt in favour of a stranger in death-bed and if such a debt is preferable to the claim of the heirs, it must be paid in full from all his estate [115] But a wakf created in such a condition is valid to the extent of one-third of the entire estate of the deceased, according to the Sunni schools, but a wakf cannot be created in favour of a heir.[116] The Shia schools hold the view that a wakf in such a condition is valid only to the extent of one-third in the absence of the consent of the heirs.[117]

On the principle of essential nature of a marriage during death-sickness for propagation of a person's species, a marriage is held absolutely valid.[118]

113 See Ameer Ali I. 466.

114 Wilson, S 285; See Fazl Ahmad V. Rahim Bibi 40 All. 238 (1918).

115 Baillie I. 693; Ham. Hedaya, 437.

116 Ham. Hedaya, 223; Baillie I. 612, II. 257.

117 See Ali Hussain V. Fazal Hussain Khan 36 All. 431 (1914)

118 Ham. Hedaya, 436, 685.

X

The Law of Wakf

§ 1 Preliminary Observation

Long before the origins of the common law doctrines of uses and trusts, the Sharia of Islam recognized and developed the institution of Wakf by permitting an owner to settle his property to the use of certain beneficiaries, in perpetuity with full legal formilities akin to the modern doctrine of trust. [1] It was the most important part of the law, for it remained inter-woven with the entire religious life with the social economy of Islam. [2] The Islamic origin is directly attributed to a tradition of the Prophet and related through Hadhrat Umar who created the first Wakf. The tradition runs:— "Ibn Umar reported "Umar ibn al-Khattab got land in Khaibar; so he came to the Prophet, (peace and blessings of God be on him), to consult him about it. He said, "O Messenger of God! I have got land in Khaibar than which I have never obtained more valuable property; what does thou advise about it? He said: If thou likest, make the property itself to remain inalienable, and give (the profit from) it in charity. So Umar made it a charity among the needy and among relatives and to set free slaves and in the way of God and for travellers and to entertain guests, there being no blame on him who managed it if he ate out of it and made (others) eat, not accumulating thereby." [3] The Quran also is full of charitable injunctions, for instance God says: "They will ask thee what they are to expend in alms: Say, whatsoever good ye expend

1 Henry Cattan in Law in the Middle East, 203; for views on Roman and Byzantine origins see Perron, Precis de Jurisprudence Musulmane; Clavel, Le Wakf ou Habous (1896).

2 Ameer Ali, I. 193.

3 Bukhari, 54: 19; Wensinck, Handbook of Early Muhammadan Traditions, 245; Mohd. Ali, Manual 331-2 No. 14.

it should be for parents and kinsmen, and the orphan and the poor, and the son of the road; and whatsoever good. Ye do, verily, of it God knows." II. 211 (Palmer's transl.), and similarly other verses are related to the objects and meanings of a wakf. [4]

The essential incidents of a Wakf are that the settlor or Wakif must be possessed of legal capacity for a valid alienation of property, the property must be tangible in nature (with some exceptions), it must be declared for Wakf by the owner, in an irrevocable, unconditional and permanent form and lastly, the object of the Wakf must be charitable. [5]

The institutions of Wakf serves many purpose similar to the doctrine of trust in the Anglo-American law. It has been used to apply the benefits of property to desired purposes, which have great social importance for the community, for it signifies the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the benefit of mankind. [6] Both Wakf and trust are closely akin to each other, for under both concepts a property is reserved and its usufruct appropriated for benefit of general public by making the property inalienable and securing administration by trustees and Mutawallis. [7]

According to the Common Law systems, it is as yet difficult to see how the notion of the trust could have been satisfactorily developed without separating the common law from equity, for the notion was not recognized in England

4 See III. 134; XXX. 39; LVII. 18; LXIII. 10; LXIV. 16-17: for objects see II. 273; IX. 60, for meanings see: LI. 19.

5 Ameer Ali I. 232 etsq.; Ham. Hedaya, 231 etsq.; Baillie I. 558; Fatwai-Hindi X. 60.

6 Baillie I. 558; Ham. Hedaya 231; Ameer Ali I. 193; compare: Scott, Harvard Legal Essays, 419 (Ed. Pound).

7 Henry Cattan, 212.

till the time of Maitland.[8] The Civil law systems of the Continent knew no institution of trust for there was no duality of law and equity, though fiduciary relationships were often created.[9] It is generally accepted that the Muslim institution of Wakf was earlier than the English trust. The legal theory of Wakf was originated and developed during the eighth and ninth centuries of the Christain era, and the origins of trust as based on the first recorded cases referred by Bracton is attributed to the year 1224 A. D. and the uses were introduced in England in the thirteenth century.[10] The early application of the English uses and their comparison with the Sharia Wakfs of family and charitable purposes are much similar. The best proof is found in the English legal history that, "By means of directions given to feoffees to use, land owners could charge their land with annuities in favour of their relatives or dependents or with portions to their wives and younger children, and they could found charitable institutions and provide for their management.[11] In the Sharia the Wakif of a Wakf property is similar to the person making feoffeement to uses, which was later known as settlor, and the position of the muslim mutawalli was similar to the feoffee to uses later known as trustee, and both the concepts recognized the beneficiaries with the vesting of the property in perpetuity. The muslim institution was fully developed in the Muslim countries before the origin of uses in the West, and it is a matter shown by history that pilgrimages to the

8 Paton, 431 citing Maitland's Collected Papers III. 321.

9 See, Bolgar, Why No Trusts in the Civil law? 2 Am J. Comp. L 204 (1953); Hefti, Trusts and Their Treatment in the Civil Law, 5 Am. J. Comp L. 553 (1956), for like devices in the Civil Law see, Nussbaum, Sociological and Comparative Aspects of the Trust 38 Col. L. R. 408 (1938); Batiffol, The Trust Problem as seen by a French Lawyer, 33 J. Comp. Leg. & Int. L., (3rd ser.) Pt. III-IV. 18 etsq (1951).

10 Henry Cattan, 213; Pollock & Maitland, History of English Law II. 229 (2nd. Ed.)

11 Holdswoerth, History of English Law IV. 440.

Holy Land and the Crusades led the European people to their familiarizations with the muslim legal institutions of the time, for it has been remarked that "The coincidence of the thirteenth century 'Renaissance' with the period of the crusades is striking, and it would be rash to deny any share in the outburst of intellectual energy which marks the thirteenth century to the new ideas and broadened outlook of those who, having gone on crusade, have seen the world of men and things in a way to which the society of the tenth and eleventh centuries was unacustomed."[12] Hence, it seems that the other theories of derivation of the English uses from the Roman *Fideicommissum* has been rejected fully by researchers.[13] , and similar is submitted to the theory of origin of use through Germanic Law.[14] The only thing for the further progress of the English use was its refinement, and its absence in the muslim Wakf until the present time is notable. The English jurists checked at an early time the injurious consequences resulting from trust by the rule against perpetuity, while the Muslim countries continued to accept the institution of a Wakf according to its original status without adapting it to the changing conditions suitable for society in various other shapes. Yet, it is reasonable to submit that the Anglo-American notions of trusts were originated and derived from the Islamic institution of Wakf.[15]

12 Passant The Effects of the Crusades upon Western Europe, Cambridge Medieval History, V. 331 (1926); Henry Cattan, 214-15.

13 Pollock and Maitland II. 239.

14 Henry Cattan, 216; compare Thomas, Note on the origin of uses and trust.....Waqfs, 3 Southwestern Law Jl. 162-166 (1949).

15 Ibid. 213 etsq.; for other views see Perron, and Clavel ref. supra note 1. See also: Holmes. "Early English Equity" 1 L. Q. R. 163; Max Radin; Handbook of Anglo-Amrican Legal History, 430 etsq. (1936); Holdsworth IV. 410 etsq.; Story, Equity Jurisprudence, S. 1137 p. 787; Lord Thurlow in White v. White 1 Bro. Ch. Cas. 12 (1778) view's the origin and derivations from Roman or Civil Law, but Lord Eldon in Moggridge v. Thackwell, 7 Ves. 36 (69) (1802-1803)

What-else be the close similarity of origins of the two institutions, they differ fundamentally from each other. The main important difference is that under the Anglo-American law the legal-estate remains vested in the trustee as ownership, while the Mutawalli of the Sharia is not owner but a mere manager. A Wakf must be perpetual for validity, while a trust with the exception of a 'charitable trust' cannot be perpetual. In a trust, the settlor can himself lawfully take an interest, which is not permitted (except to the Hanafi views) in a wakf. The motive of a Wakf must always be religious and the property must be dedicated to God with permanency and irrevocability, but in a trust the motive may be temporal.[16] A trust is an obligation attached to the ownership of property and under it the trustee has to apply and use the income of the trust property for specified purposes and persons. Under the Wakfs the property is appropriated to subject it to the rules of divine property by extinguishing the rights of the appropriator and vesting it in God in a way that its profits revert to and be applied for the benefit of mankind.[17]

§ 2 The Law of Wakf

DEFINITION

A wakf in the primitive sense means detention, and in the language of the law it signifies the detention of a thing in the implied ownership of Almighty God, in such a manner that its profits may revert to or be applied for the

referring to Lord Thurlow's view admitted his ignorance about the origins of the doctrines of charities. It is said that the materials for the origin of the jurisdiction of Equity courts in relation to charities are scanty, for in fact the history of the law of charities itself, prior to the statutes of charitable uses (43 Eliz. C. 4) is extremely obscure: cf. Ganpathi Iyer, Hindu and Mahomedan Endowments, 2-3 (1918).

16 Ameer Ali J. in Vidya Varuthi V. Balusami Ayyar, 48 I. A. 302 (1921); see also, Jewan Doss Sahoo V. Shah Kubeerooddin, 2 Moo. I A. 390 (1840); Mohd. Rustam Ali V. Mushtaq Husain, 47 I. A. 224 (1920); Ameer Ali I. 195; Henry Cattan, 212.

17 Ham. Hedaya, 213; Baillie I. 550.

benefit of mankind. [18] It is constituted by the appropriation or tying up of property in perpetuity so that no proprietory right may be exercised over the corpus but only over the usufruct.[19] The exception of the usufruct is made upon the fundamental muslim belief that as God is above using or enjoying any property, the usufruct must necessarily be devoted for the benefit of human beings. [20]

CREATION

A wakf must be created by a person possessed of legal capacity and fit to alienate property, and thus a Wakf by an insolvent person, or by a person who wants to defraud his creditors, and by a guardian on behalf of a minor is invalid.[21] Similarly a conditional Wakf is held invalid, but not in case, where the condition is for the user of the profits of the Wakf property. The dedication must be immediate, unconditional, and it is not essential that the Wakf be made in writing.

The property becomes a Wakf upon a declaration by the owner or Wakif by permanent reservation of the income for a specified purpose. The result is that the ownership ceases, and the property becomes unalienable and so its devolution ceases for the heirs, and the property is administered by the mutawalli. The law recognizes the creation of testamentary wakf upto the extent of the legal third of the dedicator's estate and more than the legal third is also valid with the consent of the heirs after the death of the

18 Ham. Hedaya, 558; Baillie I. 558; Fatwai-Hindi X. 60; compare the definition in the Mussalman Wakf Validating Act, 1913 as "The permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman Law as religious, pious or charitable". S. 2 (1); see Mahomed Yusoof, Review of the law of Wakf, 2 Cal. L. J. 117n-169n (1905).

19 Abdur Rahim. 304; Milliot, Droit Musulman Ch. V. 536 etsq.

20 See Hedaya and Fathul Qadir V. 416-22; Abdur Rahim, 304; Milliot, 552 etsq.

21 Fatwai-Hindi, X. 62.

person dedicating the property in Wakf [22] In the absence of any express evidence of dedication a Wakf may be created by long user. [23]

METHOD OF CREATION

Upon the point of the modus operandi of creation of a Wakf, the jurists of the Islamic Sharia differ from each other.

VIEW OF IMAM ABU HANIFA

According to Abu Hanifa, the legal meaning of a Wakf was the detention of a specific thing in the ownership of the Wakif, by devoting its profits or usufruct in charity on the poor or other good objects in the manner of an Ariyat or commodate loan.[24] He further held that the ownership is not extinguished in the property, unless with the order of the judge.[25] He fortified his view by reference to a tradition of the Prophet for the validity of sale of a Wakf property, and that no spiritual benefit could be derived unless the Wakif remained the owner of the Wakf property. Upon the failure of the object, the property returned to the Wakif and his heirs, for the appropriator's rights could not end without the property being transferred to some other person, for the law does not admit the idea of a thing during its existence by going out of the possession of one proprietor without falling into the possession of another proprietor.[26] The only exception recognized by him was a Wakf for a mosque and a testamentary Wakf upon the death of the testator.[27]

22 Ibid 61.

23 See Mazhar Hussain v. Adiya Saran 1 M. L. J. 259 (1948): 1948 P.C. 42; Mohd. Shah V. Fasiuddin A. I. R. 1956 S. Ct. 713; however see also State of Madras V. Mohd. Sahib A. I. R. 1963 Mad. 39.

24 Ham. Hedaya, 231; Fatwai Qadi Khan IV. 199; Fathul-Qadir V. 416.

25 Ham. Hedaya 231; Baillie I. 557; Ameer Ali I. 336; Kifaya II 887; Inaya II. 667.

26 K. Tayybji, 104-105; Ham Hedaya 232; Raddul-Muhtar III. 356; Bukhari, 43: 11.

27 Henry Cattan, 206.

The Desciples --(1) VIEW OF IMAM MUHAMMAD

Imam Muhammad puts two conditions for the creation of a Wakf. Firstly, the owner must make a declaration with intention to create a Wakf, and secondly, he must deliver the possession of the property to the mutawalli and the proprietory right is extinguished in the property.

(2) VIEW OF IMAM ABU YUSUF

Imam Abu Yusuf was well aware of the benefit of the institution of Wakf in the community and so based the theory that a Wakf was analogous to *Ijara* and sale, and so it was void if made temporarily. So a Wakf must be irrevocable and permanent by vesting it in God, by extinction of the rights of the owner, with the application of the benefit for mankind.[28] He differed from Imam Muhammad and held that due to the transfer of property for consideration, the requirement of delivery of possession remains modified.[29]

VIEW OF IMAM SHAFII

Imam Shafii's view was according to Abu Yusuf, as the corpus was transferred to God, and if the beneficiaries failed the usufruct only reverted to the Wakif's heirs.[30]

VIEW OF IMAM MALIK

Imam Malik's view was closer to Abu Hanifa's view, for it has been said that, "the bare ownership remains in the Wakif, in reality during his life, and fictitiously after his death".[31] He further held that the dedication need not be permanent, for he allowed a temporary Wakf, even for a short period of a year upon the basis of his above views.[32]

28 Ham. Hedaya, 234; Fatwai-Qadi Khan IV. 235; Ameer Ali I. 336; Baillie I. 559.

29 Fathul-Qadir II. 632; Durrul-Mukhtar, 299.

30 Minhaji II. 185-89.

31 Seignette, Code Musulmane, 389; K. Tyabji, 107.

32 Perron, Jurisprudence Musulmane V. 42. 45, 53, 56; Wilson, p. 338.

VIEW OF THE SHIA SCHOOLS

The Shia jurists maintained that a Wakf cannot be valid by mere declaration, unless the possession was delivered. They defined a Wakf as, "a contract, the fruit or effect of which is to tie up the original of a thing and to leave its usufruct free".[33] They further held that if the beneficiaries became extinct, the property automatically reverted to the heirs of the founder in general.[34]

THE MODERN JUDICIAL VIEWS

The general view prevalent these days accepts the view of Imam Abu Yusuf, which is the general Hanafi rule that a Wakf must be perpetual for validity, and it cannot be revoked even by reserving such a power.[35]

The judicial views of India, Pakistan and Burma accepting the opinion of Abu Yusuf have held that a valid Wakf can be constituted according to the Hanafi school by a mere declaration and it is not essential for its completion that the mutawalli should be given possession of the Wakf property.[36]

CONDITIONS OF VALIDITY

The required conditions for the validity of a Wakf are, firstly, the settlor must be possessed of full legal capacity to create a Wakf by transfer of the property, secondly, the property must be of tangible nature. An incorporeal property cannot be given in a Wakf, and upon the movable property there is a conflict of opinion, and the prevalent view is against their dedication. Yet upon beneficial uses, some exceptions have been recognized in favour of movables

33 Baillie II. 211 (Sharai-ul Islam).
34 Ibid; Query, Droit Musulman I 585; K. Tyabji, 107.
35 Henry Cattan, 207.
36 See Bibi Jinjira Khatun V. Mohd. Fakirulla Mia 34 Cal. L.J. 44; AIR 1922 Cal 429; Ma Ekhin V. Manung Sein 2 Rang. 495 (1924); Mohd. Ibrahim V. Bibi Maryam 8 Pat 484 (1929); Zaffar Hussein V. M. Ghias-Uddin 18 Lah. 276 (1937); Abdul Razak V. Jimbabai 14 B. L. R. 295 (1911); Rahiman V. Baqridan I1 Luck. 735 (1936),

permanently fastened to immovable property. Similarly the dedication of a Quran for reading, and also animals as horses, camels, can be made Wakf.[37] Thirdly, the property must be declared with clear intention by the owner. Fifthly, the dedication must be irrevocable, permanent, and unconditional, and sixthly, the object must be charitable generally, though it need not be the immediate beneficiary, for the charitable purpose of the dedication serves as its legal justification and constitutes the basic condition of its validity.[38]

SUBJECT

The Sharia divided a property for the purpose of Wakf in the following classes:—

1. Immovable;
2. Movable accessory to an immovable property;
3. Movables not consumed in the process of use of Wakf and whose use was customary;
4. Things not consumed in the pocess of its use, but a Wakf which was not common;
5. Movable property consumed in the process of its use.[39]

All the schools have agreed upon the first kind of property as a fit subject of Wakf. As regards the second and third categories, the jurists disagreed upon their validities. Abu Yusuf held them as invalid for a Wakf purpose, while Muhammad held as valid, and the fatwa is with the latter.[40] As regards the fourth category under which come things like clothes, cattle, etc. though the jurist again

Nanhoon Beg. V. Ghulam Hussain I.L.R. 1950 Nag 633: AIR 1951 Nag. 394.
37 Wilson S. 318 (1); Abdur Rahim 307; Fitzgerald, 214; Henry Cattan, 205.
38 Henry Cattan, 206; Ameer Ali I. 232.
39 Ham. Hedaya; 234-35; Baillie I. 570-72.
40 Fatwai-Hindi X. 70; Baillie I. 571.

differed, yet the majority held in favour of validity. [41] As regards the fifth category, the better opinion maintains that if there was a local custom to create a Wakf of such property, the Wakf was valid, as for instance, the Wakf of money upon creation should be lent to the poor for use and then realized, and so used for ever. [42] The Shafii school holds that the dedication of every kind of property which is not consumed in use is lawful. [43] The Shia schools holding closely to the Shaffi school maintain that the Wakf must be of corporeal things and incorporeal things like debts cannot be made Wakf, though upon the basis of utility a dog or a cat can validly be made a Wakf. [44] Upon the validity of Wakf of money, they differed, yet the better opinion accepted the validity. [45]

As regards the Wakf of a Musha, the general opinion of all jurists is that the Wakf of a share in a property which is incapable of partition is valid, yet they differ if the property is capable of partition. Muhammad holds, upon his theory of possession that it is invalid, while it is valid to Abu Yusuf, and upon which is the fatwa. [46] All the jurists agree that the Wakf of a Musha in a property for building a mosque in it or turning it into a burial ground is not valid. [47] The Shia schools maintain that the Wakf of an

41 Ham.Hedaya, 235.

42 Baillie I. 558; Fatwai-Hindi X. 71; see also, Fatwai-Qadi Khan, IV. 240; Raddul-Mukhtar III. 578; Aini, Sharh-al Kand I. 345; K. Tyabji, 114 etsq.

43 Ham. Hedaya 235; Taybji, S. 476; Minhaj II. 182; Fathul-Qarib, 401; Ganpathi Iyer, Hindu and Mahomedan Endowments, 360 etsq; Ameer Ali I. 248 etsq.; Abdur Rahim, 307 etsq.

44 Query I. 577; Baillie II. 213.

45 Suhrawardy, The Wakf of Movables in Jl. of Royal Asiatic Society of Bengal (June 1911), 355; see Ameer Ali, I. 248; Abdur Rahim, 307; Ganpathi Iyer, 360 etsq. for critical analysis of the law.

46 Ham. Hedaya, 233i Fatwai-Hindi X. 73; Bailli I. 564, II. 214; Fatwai-Qadi Khan IV. 226.

47 Ham. Hedaya, 233; Fatwai-Hindi X 73; Baillie I. 573; See also

undivided thing is valid upon the analogy of sale. [48]

The fundamental principle of the Islamic Sharia declares Wakf as a religious, pious and charitable institution. The subiects to be dedicated in Wakf must be of the like nature and in other words they must not be tainted or *Khabis*. Sometime it may happen that properties earned other than by lawful means may be dedicated in charity. The Sharia, it is no doubt remains concessional to the views of human nature, yet the spirit of the law must be maintained in such cases where there seems no other alternative. If properties earned other than by lawful means are given in Wakf, it may amount to sin, for it is an act to dishonour God and to displease Him. The Quran expressly says that, "O Ye who believe ! expend in alms of the good things that ye have earned, and of what we have brought forth for you out of the earth, and do not take the vile thereof to spend in alms,- what you would not take yourselves save by connivance at it; but know that God is rich and to be praised". II.269-270 (Palmer's transl.).

The traditions of the Prophet also are to same effects that tained or Khabis properties must not be given in Wakf. [49] The reason of the rule of the Quran has been explained that "According to the English proverb, "Charity covers a multitude of sins." Such a sentiment is strongly disapproved in Islam. Charity has value only if (1) something good and valuable is given, (2) which has been honourable earned or acquired by the giver, or (3) which is produced in nature and can be referred to as a bounty of God ..... " and "to dedicate tainted things to God is a dishonour to God, Who is independent of all wants and Who is worthy of all honour and praise." [50] Further, the

Mohd. Badrul Haq Rashidi V. Shah Hasan Ahmad AIR 1935 All. 278: 1935 A.L.J. 400.

48 Query, I. 578.

49 See Bahari-shariat; Fatwa Moulvi Abdul Hai (Lucknow).

50 A. Yusuf Ali, The Holy Quran, Text, Transl. and Commentary, I.

Islamic notion of law is so intimately connected with religion which cannot readily be disserved from the other for in Islam there is a doctrine of certitude in the matter of Good and Evil. [51] The net result is that lawfully earned things must be given in charity, but it is submitted that God is Merciful, He forgives those who repent and expiate by foreswearing, and then the matter may arise when the taint may be made to be washed of and the thing be made concessional to be given in the way for religious acts. [52]

OBJECTS

The institution of Wakf clarifies itself that its object is to preserve for ever a property by providing its income for the mankind, on the basis of the theory that they may be dedicated to any purpose not illicit in the Sharia. The Quranic provisions as regards the objects of charity are contained in II.273, X. 60. A Wakf is allowed to be created in favour of pious objects, as in favour of the poor, of a mosque or of a school, or it may be made with no pious intention as in favour of a specified particular (rich) person. [53] In other words, a Wakf is always used to denote the dedication for pious and charitable purposes, due to the reason of religion and because in a private Wakf the ultimate beneficiaries are always the poor and the similars. Hence generally, with some exceptions, any one who is capable of possessing property may be a beneficiary under a Wakf, with the dominent intention to acquire merit in the eye of God. [54] But the fundamental rule of law is that the ultimate obiect of a Wakf must be one that cannot fail. [55] The

108-109.

51 Mahmud J. in Gobind Dayal V. Inayatullah 7 All. 775, 781 (1885); Ostrorog, The Angora Reform 16; Fyzee, 14.

52 See the Quran II 263, III. 134, IV. 17 t, XXIV. 22.

53 Minhj, 230; see Ganpathi Iyer, Hindu and Mahomedan Endowments, 360 etsq. for a critical discussion.

54 Ameer Ali I. 213 etsq.; Ham. Hedaya, 240; see also: Bikani Mia's case 20 Cal. 116 (1892); compare Matt. XXVI; John XII. 8 etc.

55 Baillie I. 566; Ham. Hedaya 234.

views of Abu Hanifa and Muhammad are that it is essential that the Wakif should expressly mention the ultimate object, otherwise the Wakf would be invalid, but Abu Yusuf maintains that though such object may terminate, yet it passes to the poor. [56] Further upon the same theory, the Hanafi law maintains that the beneficiary must be alive at the time of the taking in effect of the Wakf and so the Wakf in favour of objects before their coming into existence is held valid. To the same effect is the view of the Maliki school, but in the Shafii law the acceptance of the beneficiary is essential in cases of ascertained and determined person. The Shia law proceeds further and maintains that a Wakf as being a contract, cannot be made for an unborn person. [57]

The objects according to the accepted views fall under the heads of:

1. Relief of the poor;
2. Provision for the Wakif and his family;
3. Specified persons irrespective of their being rich or poor or relations;
4. Mosques and grave-yards;
5. Caravanserais, aqueducts, roads bridges and the like. [58]

The important category of Wakf is a Wakf for the Wakif and his family. Baillie's Digest criticising the translation of Hamilton's Hedaya says that, "Mr. Hamilton has unnecessarily restricted the legal meaning to appropriations of "a pious or charitable natu e" (p. 334) and he has been followed by Macnaughten, who renders the word by 'endowments'. But it will be seen hereafter that the term is more comprehensive, and includes settlements on a person's

56 Ham. Hedaya 231; compare the compromise between the two views by S. 3 of the Wakf Validating Act of 1913 in India.

57 Durrul-Mukhtar, 361 (Transl.); Seignette, Code Musulmane, 390; Minhaj II 185; Query I. 578 cited by K. Tyabji. 130-31.

58 See Tyabji, 589.

self and children." [59] It is clear that the Hanafi school has no objection to a man making Wakf of all his property in life and may exclude others including children from it, but the Maliki school holds that the creation of a Wakf for male descendants by excluding the females is invalid, as it defeats the law of succession.[60] Upon the point where the Wakif makes himself the beneficiary, the view of Abu Hanifa and Muhammad are against except where he was benefiting as one of a class.[61] As against this view, Abu Yusuf holds as valid on the basis of qiyas or analogy, and this view is accepted by the authors of Durrul-Mukhtar and Fatwai-Alamgiri.[62] All the other schools hold that a Wakf cannot reserve any benefit for himself in a Wakf, and even he could not be the first mutawalli of the property.[63]

Upon the matter of the extinctions of the objects of a Wakf the Hanafi school holds that if the beneficiaries fail, the property will go to the poor,[64] but the Maliki school holds that the corpus of the dedicated property continues in the Wakif and his heirs. The Shafii school holds that the

59 Baillie I. 557; see: Fyzee,254 etsq. (for a fine discussion and judicial views (English notions) upon the Islamic family wakfs which resulted in the passage of the Wakfs Validating Act, 1913 of India); see Fatima binti Mohamed V. Mohamed bin Salim 1952 A. C. 1 (a Kenya case in Appeal to H.L.); see also: Majid, Wakf as family settlement among the Mohammedans, 9 Jl. of Comp L 122-141 (1908); the view of the Indian Supreme Court about the invalidity of a family wakf (Ref. Mussalman Wakf Validating Act, 1913, Wakf Act, 1954) of taluqdari properties by operations of Ss. 2, 11, 12, 18 of the Oudh Estates Act, 1869 on violations of the rule against perpetuity under Ss. 14 and 18 of the Transfer of Property Act, 1882 in Mohd. Ismail V. Sabir Ali AIR 1962 S. Ct. 1722 and note the contrary opinion of the minority.

60 K. Tyabji, 132.

61 Ibid; Fatwai-QadJ Khan IV. 251.

62 Fatwai-Qadi Khan, IV. 251; Ham. Hedaya 237.

63 K Tyabji, 133-134; Minhaj II. 183; Query I. 583; Seignette, Articles 1240, 1246, 1247.

64 Raddul-Muhtar III, 588.

usufruct alone returns to the founder's heirs as the corpus becomes vested in God.[65] However, there seems to be an agreement that upon the extinction or disappearance of the charitable object specified in the declaration of a Wakf, the whole benefit is to be applied to another charitable or pious purpose.[66] The Islamic Sharia is quite closer to the Western systems upon the matter of failure of the object of trust, as it has been observed that, "If, however, the specified object be limited or happen to fail, but a general charitable intention is to be inferred from the words of the grant, the Wakf will be good and the income or profit will be devoted for the benent of the poor, and in some cases, to objects as near to the objects which failed as possible. This rule is analogous to the doctrine of Cypress of the English law."[67] The reason of the rule may be traced in the wordings of a recent writer who says that, "The cypress doctrine aims at a judicial determination of a particular purpose to which the trust fund shall be applied which is as near to the settlor's intention as possible. Under Islamic law, there is no provision or machinery for such determination. It is assumed as a basic principle that the ultimate purpose of a Wakf is charitable and, therefore, the appropriation of the benefit of the Wakf to the poor is a fulfilment of this purpose. Since the benefit of the poor is considered to be a residuary charitable object of a waqf, there is no necessity for a close scrutiny of the settlor's intention and careful construction of the trust instrument, as is required under the cypress doctrine."[68]

65 Seignette, Article 1251; Minhaj II. 185; K. Tyabji, 135 etsq.

66 Henry Cattan, 207.

67 Abdur Rahim, 305; under the English law, if the name itself imports a charitable object, the gift will be executed according to the doctrsne of Cypress Cf. Theobald on Wills, 372 (7th. Ed.); In re Davis-Hannen V. Hillyer, 1 Ch. 876 (1902).

68 Henry Cattan, 507-8; see Fatwai-Hindi X. 186; Ameer Ali I. 322; see also: Hashim Ali Khan V. Hamidi Begum AIR 1942 Cal. 180; 74 Cal. L.J. 261; Sajjada Shah V. Shaw Habit 53 I.C.

ADMINISTRATION

A Wakf is to be administered by a mutawalli, or *Nazir*, but he has less powers than a trustee under the Anglo-American law. He is an agent bound by the instrument creating the Wakf and can consult the Judge. All the schools are unanimous except the Maliki school upon the appointment of the Wakif himself as the first mutawalli. The Shafii jurists further hold that in the absence of an express appointment the Qadi or judge was the proper person for administration of the property, while the Shia schools hold that the beneficiaries can manage in the absence of the mutawalli. [69]

A mutawalli must be a major, sane person, and even a blind and woman or a non-muslim can be appointed for the post. [70] The Wakif has a right and privilege to appoint a mutawalli as laid in the Wakfnama. In default of the Wakif with the death of the mutawalli, the executor of the Wakif can appoint a successor to the deceased mutawalli and who has a preference to the Judge. [71]

Where the Wakif fails to appoint a mutawalli or the mutawalli dies or is dismissed and the Wakif or his executor is not living or remains disabled, the Court or the judge has power to appoint a mutawalli. In so appointing the Court must respect the wishes of the Wakif. [72] In India the district judge has been authorized to act as the Qadi or the Court of the Sharia. The Court has wide discretions in the matter. But in cases where a descendant of the Wakif is fit for the appointment with will, the Court has no discretion to appoint an outsider. [73] The Wakif

677; 1912 M.W.N. 45.

69 Kifaya and HedayaII. 905; Raddul-Muhtar III. 558; Ham. Hedaya 238; Durrul-Mukhtar; 302; Fathul-Qadir II. 640; Minhaj II. 191.

70 Baillie I. 601.
Fatwai-Hindi X. 120; Bailiie I. 604.

72 Baillie I. 604; Fatwai-Hindi X. 121.

73 Ibid; Ibid.

has a right to remove a mutawalli if he reserves such a right in the deed of the Wakf, and similarly the Court has power in the interest of the Wakf property to remove him upon his neglect, misconduct in duties and other related matters, but a duly appointed mutawalli cannot abdicate without the previous permission of the Court. [74]

The law specifies the rights and duties of the mutawalli. He is bound to take possession of the property, and must take all lawful steps to protect the Wakf property. He can lease out agricultural land for three years unless the beneficiary's interests permit for a longer period.[75] He cannot lease out a residential house for more than one year unless considered necessary by the Court. The Maliki school allows a lease for two years of lands and houses, while in the Shia schools the beneficiary being the owner the question did not arise and the beneficiary could lease it [76]

The harshness arising from the nature of inalienability of the Wakf property was realized by the jurists of the Ottoman Empire period, and they created devices for evading the rule. For example, one of the device was called *Ijaratayn*, by which a Wakf property with the previous permission of the judge was leased permanently to a person who undertook to pay, firstly, an advance rent which was used for the repair and improvement of the corpus of the Wakf, and secondly, a postponed rent was payable annually, which was equivalent to three percent of the assessed value of the property. By this device, the lessee acquired permanent right of enjoyment of the Wakf property as his rights

74 Baillie I. 601-602; Fatwai-Hindi X. 822.

75 Ibid.

76 Seignette, Article I278; Query, 590; Fatwai—
Hindi X. 128; trustees cannot transfer their duties, functions and powers to some other body of men and create them trustees in their own place, unless this is clearly permitted by the trust-deed or agreed to by the entire body of beneficiaries; Abdul Kayum V. Ali Bhai AIR 1963 S. Ct. 309 (A Daudi Bohra case.)

become by statutes assignable and inheritable.[77] The reason behind the devices was to minimize in part the undesirable economic aspects which resulted from the immobilization of the institution of Wakf.[78]

A Wakif possessed the power to fix any remuneration of the mutawalli at the time of the dedication, which may be paid to the mutawalli or his descendarts for ever. Even if the Court dismisses him from the Office, he and his descendants continue to get the fixed sum, or in other words they will be treated as beneficiaries.[79] In the absence of any fixation of remuneration by the Wakif, or if the amount was too low, the law permitted the Qadi or Judge to fix a proper allowance, which did not exceed one-tenth of the income of the Wakf property.[80]

A Wakf property can be lost by adverse possession as the law of limitation is applicable to it, but a judicial remedy against the Mutawalii or his legal representatives or assigns (except for valuable consideration) could not be barred for any length of time.[81] In India (and Pakistan) various central and provincial acts have been passed after the Act of 1913 and it is recommended that the readers would consult other text-books upon Muhammadan substantive law.

§ 3. Other Related Institutions

GENERAL

The fundamental principle of the Islamic legal theory of Wakf is by nature religious pious and charitable. Hence the objects of Wakf may validly be created for the benefit of mankind, and under such theory Wakfs of mosques, grave-yards, Khanqah and the like are proper and valid.

The wakf of a mosque and a graveyard or *Takia* was provided with special rules in the Sharia. Such wakfs

77 Henry Cattan, 209.
78 Ibid. 210.
79 Fatwai-Hindi X. 136.
80 Ameer Ali I. 369.
81 Tyabji , S. 497 B; Fyzee 271-72.

were permitted to be permanent by all the schools of law and remain inalienable at all times.[82] Even the buildings of such wakfs were so, though Abu Yusuf later permitted that upon their falling down, the materials could be sold and the proceeds be applied for another similar institution.[83] Similarly, the doctrine of Musha was held inapplicable in cases of wakfs of mosques, even with a property that would normally be considered indivisible. The reason of the rule was in the fact that a mosque must have a separate door to enter into, and hence the upper story of a house, which could not be reached without going through the rest portion of the house, could not be dedicated for this purpose.[84]

MOSQUES

An individual may dedicate a building or a plot of land for turning into a mosque or for the use of it. Upon the completion of the purpose, the proprietory rights of the person is extinguished and the ownership vests in God, and all muslim persons are authorized to say prayers in it. The views of Abu Hanifa along with Muhammad are that the proper mode of delivery of possession in the case of a mosque is public worship and unless a prayer is not performed in the building, the dedication is not complete. Abu Yusuf holds that a mere declaration on the part of the wakif is sufficient.[85] A place once dedicated as a mosque cannot be reverted to the rights of the founder or to any other person, and even the locality becomes deserted and there is no further use of it, still the mosque stands with its sacredotal character.[86] As a wakf can be lost to adverse possession similarly a mosque can be lost where non-muslims adversely possess it.[87] Every muslim is entitled

82 K. Tyabji, 137; Raddul-Muhtar III 557; Query, 594.
83 Durrul-Mukhtar on margin of Raddul-Muhtar III. 574.
84 Ham. Hedaya, 239; Kifaya II. 893; K. Tyabji, 138.
85 Hem. Hedaya, 239.
86 Ibid. 240; Baillie I. 606; II. 221; Fatwai Hindi X. 172.
87 Masjid Shahid Gan V. Shrimoni Gurdawara Parbandhak

to enter into a mosque and say prayers in it, as a mosque does not belong to a particular sect or the inhabitants of a particular locality, and if a condition is attached for it, the condition is void, for the right to offer prayers is a legal right, upon the disturbance of which a Muslim is entitled to seek judicial remedies.[88]

The rule of Shari a says that there cannot be two congregations by two azans or calls to prayer in a mosque, for the mutawalli has been authorized by the law, and non-body has a right to interfere in it.[89] The Wakif may lay down at the time of dedication the details of management and control of a mosque with the condition that members of the same tenet and beliefs be appointed there-

Committee AIR 1938 Lah. 369: 175 I.C. 945 (F.B.) on appeal AIR 1940 P.C. 116.

88 Fatwai-Hindi X. 171; see also: Mohd. Wasi V. Bachchan Sahib AIR 1955 All. 68; P. Majilissae Islamia V. Sh. Muhammad AIR 1963 Ker. 49.

89 Ameer Ali I 310; however discussing the nature of a mosque in Jawahra V. Akbar Husain, I.L.R. 7 A. 178, 182 (1884) Petheram C.J. observed that, "According to Mahomedan custom the property in a mosque and the land connected with it is vested in no one; and is not the subject of human ownership, but all the members of the Mahomedan community are entitled to use it for purposes of devotion whenever the mosque is open." So also said Mahmood J. in the same case that when a person, "has resolved to devote his property to religious purposes, as soon as his mind is made up and his intention declared by some specific act, such as delivery etc. an endowment is immediately constituted; his act deprives him of all the ownership in the property.....in such a manner as subject it to the rules of divine property, when the appropriator's right in it is extinguished and it becomes a property of God by the advantage of it resulting to His Creatures"; see Ataullah V. Azimullah I.L.R 12 A. 494 (1889): Mahomed Kabir V. Ghulam Mahomed Ali 28 I. C. 934 (1915) see also P. Majilissae Islamia V. Sh. Muhammad AIR 1963 Ker. 49 following Nar Hari Shastri V. Shri Badrinath Temple Committee AIR 1952 S. Ct. 245.

with.[90] No part of a mosque can be turned into a property of secular character, and an individual may lawfully make a Wakf and dedicate its use and income for a mospue.[91] If the primary or intermediary object of a Wakf fails, the Wakf will be operative and the income may be applied for the benefit of the poor by the use of cypress doctrine.[92]

MOSQUE (WAKF) AS JURISTIC PERSON?

Though in a previous Indian case of Lahore a mosque was held to be a juristic person, but later, there seemed no analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individuaities of other religions. The land and building of a mosque are property and they cannot be a juristic person, for the recognition of an artificial person is not to be justified merely as a ready means for an enactment, good or bad in expression, as they do not work conveniently. The privy Council held that a suit cannot competently be filed by or against such institutions, in courts, yet the judges left open the question of the juristic personality of a mosque.[93]

In an Allahabad case, relating to pre-emption, it was held that, "the plaintiff had perfect right of pre-emption. There is nothing to prevent God Almighty from being a juristic person in the case of a Mohammadan Wakf. For the matter of procedure in the case of Wakf the mutawalli does represent the Wakf property."[94] But later on in the same High Court in a case which also related to the rights

90 Fatwai-Hindi X. 118; see also Ghazanfar Hussain V. Ahmad Bibi AIR 1930 All. 166: 123 I.C. 369: 1930 A.L.J. 109.

91 Fatwai-Hindi X. 177.

92 Ameer Ali I. 322 (3rd. Ed.).

93 Masjid Shahid Ganj case, AIR 1940 P.C. 116:67 I.A. 251 (1940); see for previous case Maula Buksh V Hafizuddin AIR 1926 Lah. 372; see also Baillie I. 618-619; Jindu Ram V. Hussain Baksh 20 I. C. 100 for gifts to mosques

94 Wakf Banam Khudawand Karim V. Raj Kali 1937 A.L.J. 1337.

of pre-emption, it was held contrary to the previous case.[96] The judges after analysing various text-books and ancient muslim authorites,[96] held that no claim for pre-emption on behalf of Wakf (even if it be a juristic person) be made, for no such suit be brought by God as it is contrary to the principles of Muhammadan law that God should figure as a party litigant.

TAKIA OR GRAVEYARD

A *Takia* or graveyard is a resting place which may be a tomb or a burial ground. The cases and comments upon the mosque are also applicable to graveyards. The person who looks after a grave is called *Mujawar* who is generally an employee of the Wakf and is paid out of the income of the Wakf property.

KHANQAH

A *Khanqah* or caravanserai is a form of monastery or religious institution where seekers of the religious truth congregate for devotional exercises. The religious head of the institution is called *Sajjadanashin* or the spiritual preceptor and is generally the mutawalli of the Wakf property of the institution.[97] The matter of succession of the preceptor is governed by an old document if containing any rule for it or upon the usages of the religious institution concerned, with major emphasis upon the doctrine of Sufism of Islam.

IMAMBARA

A *Imambara* is a private place set apart for the performance of some ceremonies of Muharram and is not open for the general public, for it is not a public place of worship

95 Mt. Girraj Kunwar V. Irfan Ali AIR 1952 All. 686 per Malick C.J. and Waliullah J.; see also Mahomed Shafiuddin V. Chatur Bhuj 1958 Raj. L.W. 461.

96 Baillie I. 474; Durrul-Mukhtar, 385 (Transl.); Sharhi Majma; Khaniah; Bazzaziah; Fatwai-Alamgiri VIII. 186; Tyabji. 711 (3rd. Ed.;) Fatwa-Qadi Khan, para 54; Raddul-Muhtar Commentary on Durrul Mukhtar by Sheikh Mohd. Amin; Aghnides, 183; Ham. Hedaya 236; Abdur Rahim, 218.

97 Tyabji S. 457; Fyzee, 275-6.

like a mosque, but when they are places of public worship, they are held as a valid Wakf and public trust.[98]

§ 4 Modern Development

MODERN NOTIONS OF PROPERTY

In the modern changing society, the concept of property has various purposes. The term is extended in the field of the economic and commercial life of the people. The Capitalist interpret it with the increasing interference of the state with the rights of the owners, and the rise of Collectivist theories are amending the notion in the shapes that property carries with it a social responsibility.[99] The increasing tendency is to build theories of property upon an analysis of the functioning and social effects of the concepts of property itself, for it has been said that "the justification of property must depend not upon any priori principle, but upon its social effects."[100] The apparent characteristics is generally felt in the limitations imposed on absolute rights by being replaced by qualified rights, being limited in the exercise through the philosophy and needs of the general community.[101] In the Civil law system the same tendency is being felt as it is prevalent in the Anglo-American law. The Code Napoleon with all other codes of the nineteenth century reflects the desire to break the power and privileges of the landed feudal-over-lordship, by making land as freely marketable as "possible", the result expected being that every piece of land would always be in the ablest and fittest

98 Tyabji, S. 457; Wilson, 373; Wilson's Glossary. 217 Col. 1; Ameer Ali. I. 392; Nawab Umjad Ally Khan V. Must. Mohumdee Begum 11 M.I.A. 517, 519 (1867); Zafaryab Ali V. Bakhtawar Singh I.L.R. 5 A. 497 (1883); Huseni Begum V. The Collector of Moradabad I L.R. 20 A. 46 (1897); Biba Jan. V. Kalb Hussain, I.L.R. 31 A. 136 (1909).

99 Paton, 435 etsq.

100 Rashdall in Property, Its Duties and Rights, 68; Cairns, Law and Social Science, 75 (1935).

101 Paton, 441.

hands.[102]

The notion of Islamic law upon Wakfs is to create a perpetuity by tying up the property for religious or charitable purposes. The law did not have any rule against perpetuity, and the jurists even insisted to create successive perpetual usufructuary grants. The result was that the institution of Wakf which was a beneficial mode for public welfare, and which was largely copied by the western legal institutions of uses and trusts, lacked to develop itself with the changing notions of time and society. The western counterparts developed the institutions for the needs of commerce and daily life of the people for they realized the danger that the large control of landowners might be used to its own destruction if the property was settled, that it was vested in perpetuity in a succession of limited owners.[103] They realized, "the mischief that would arise to the public from estates remaining for ever, or for a long time, unalienable or untransferable from one hand to another, being a damp to industry, and prejudice to trade, to which may be added the inconvenience and distress that would be brought on families whose estates are so fettered." [104] The rule against perpetuity was based upon the rules restricting remoteness and against accumulation of income which put fetters upon the free circulation and enjoyment of property, but, when property gave an object beneficial to general public, the West restricted the application of it. Hence the rule was not applied in cases of charitable trusts whose purposes were for the relief of poverty, for advancement of education, religion and other purposes beneficial to the community. [105]

102 Schlesinger, 335; Rheinstein, Some fundamental Differences in Real Property Ideas of the "Civil Law" and the Common law systems, 3U. Chi. L. R. 624 (1936).

103 Holdsworth, History of Engligh Law IV. 440.

104 Jekyll, M. R., in Stanley V. Leigh 2 P. Wms. 686 (1732); see also Jarman on Wills I 248 (7th. Ed.).

105 See English statute of charitable Trusts (43 Eliz. C. 4); Commissioners of Income Tax V. Pemsel 1891 A.C. 531 following argument in Morice V. Bishop of Durham 10 Vest. 522, 531 (1805); see S. 18 of the Transfer of Property Act, 1882; Mulla, The Transfer of Property Act, (1882) p. 121-122.

The Sharia of Islam having no similar subtelity of distinction was unable to distinguish what was adopted in the West. It left both characteristics of religious and secular notions as a mixture, the result was the dampness of the progress of ideas of a refined society, which ultimately resulted in hampered industrial and social progress.

POSITION IN THE MUSLIM COUNTRIES

However it is a matter of much interest and encouragement that many muslim countries realizing the ideas of social change adopted legislations to amend the Sharia provisions relating to Wakf to improve its features. It is more than encouraging to say that they distinguished the perpetual natures of charitable and public Wakfs and leaving them largely untouched on views of their beneficial characters, adopted to amend the parts of the non-religious private and family Wakf. In Egypt, the legislation of 1946 adopted a compromise between the abolition and maintenance of Wakfs. The legislation provided that at the option of the Wakif a charitable Wakf may remain perpetual and temporary, but family Wakfs must be limited to not more than two generations.[106] However the legislation of 1952 abolished non-charitable Wakfs and restricted their creation with the exception of charitable Wakfs. The ownership of the dissolved Wakfs vested in the Wakif or in his absence in the beneficaries in accordance to their shares under the deed of Wakf.

Similar to Egypt, the Lebanon law of 1947 was also moulded by discarding the rules of irrevocability of a Wakf and patterned according to the theory of Abu Hanifa. The law restricted the duration of a family Wakf upto two

106 Henry Cattan, 218; Prof. Anderson in 42 the Muslim World, 257-276 (1952).

generations after which the ownership reverted to the creator or his heirs. Provisions were introduced for partition of the corpus of a Wakf to enable each beneficiary to administer his share with the abolition of the conditions of a Wakf which restricted the liberty of a beneficiary in relation to marriage, residence, etc. This was an adoptation of the Hanbali and Maliki schools. [107]

In Syria, the family or *Dhurri* Wakfs were abolished but the charitable Wakfs were left untouched by the law of 1949. Various provision were introducd in the Wakf having both family and charitable natures. So, if the Wakif had shown that the share was belonging to the charity, such share shall be allocated to it, otherwise in the absence of any indication the proceed were to be utilized to charitable objects with the condition that the appropriation shall not be less than five percent nor in excess of twenty percent of the proceeds. [108] The Turkish Government abolished the Wakf Ministry itself in 1920.

The positions of other muslim countries remain still in accordance with the views of Sharia's fatawas, yet some of them kept the institution according to the more favourable notions of other Sunni schools. For example, Saudi Arabia interpreted and applied the theories of the Hanbali school and in hardship cases permitted the applications of the provisions of the other schools.

In India and other nearby countries, where the Islamic law is applied generally in more or less in its pure forms, it is disgusting to note that though various legislations have been adopted which give more scope for state controls, yet the changes of time have not been kept in view. The theories of property have changed and now a property is a medium for better development of mechanical and ethical progress of humanity. What has been said in the first para of this section is totally lacking in the Muslim countries

107 Ibid. 219.
108 Ibid. 221.

living without change. In the case especially of Indian muslims the situation is aggravating, for though no doubt a Wakf having religious purposes of charity and public welfare unavoidable in a modern democratic society, yet the place of a private family (non-religious) Wakf is out of date for they give rise to lacks of incentives to work depending for livelihood upon the income of the Wakf property without improvement in the property itself. The writer may be criticized by the orthodox but to such critics the answer may be of the recognized Hanafi doctrine that "the provisions of the law vary with the change of the time." [109] The reason of the rule may be said in the view that," the soundness and durability of a legal institution lie in its ability to survive changing circumstances and adapt itself to new ideas and conditions," and, hence, "the rigidity that has encompassed the law of Wakf for centuries made it impossible for this institution to withstand the impact of modern trends....." [110] It is submitted, that nothing can be done for a more progressive society, unless the words of al-Zurqani of the Maliki school that "new decisions can be given with regard to new conditions," are adopted, especially in the institution of Wakf itself.[111]

109 Cited by Prof. Fitzgerald in Law in the Middle East, 110.
110 Henry Cattan, 222; Prof. Anderson in 42 The Muslim World 257-276 (1952).
111 Cited by Prof. Fitzgerald, 110; note also the similar provision of the Majalla that, "It is an accepted fact that the terms of law vary with the changes in times." Article 39: Cf. Hoofer, Civil Law of Palestine and Trans-Jordan I. (1933); Fyzee, Intro. to the Study of Mohd. Law (1949). Compare, it with the American Functional School: see Pound, Jurisprudence (1959).

XI

The Law of Pre-emption

§ 1 Preliminary Observation

The Islamic Sharia recognized in connexion with an immovable property a certain right in restraint of the power of alienation of the owner which was called *Shufa* or the right of pre-emption.[1] It is a right to acquire by compulsory purchase, in specified circumstances, the alienated immovable property in preference to all other persons.[2]

The law of pre-emption is not only peculiar to the Islamic system. It was also recognized in the Roman law and other systems. In the Roman law, it sanctioned a compulsary relation between the vendor and a person predetermined, binding the vendor to sell to that person if he offered as good condition as the intended vendee. It arose from agreement and from the sanctions of written law, but was protected solely by a personal action and gave no right of action against the vendee to whom the property has been passed.[3] The Hindu System of the Ancient India recognized the law of pre-emption and permitted it to be exercised upon the sale of land in favour of full brothers, sapindas, samanodakas, sagotras, neighbours, creditors and one's co-villagers in a respective order.[4] The Hindu system vested the right among members of one village in a text, which declared the assent of townsmen, of kinsmen, etc. as requisite of the transfer of a landed property.[5] The

1 Fatwai-Alamgiri V. 249; the Majalla (Articles 1008-1012 etc.).

2 Wilson, S. 350 p. 374.

3 Holloway C. J. in Ibrahim Saib V. Muni Mir Uddin Saib 6 Mad. H. C. 2-6 (1870).

4 Kane, History of Dharmasastra III 496 quoting Vyas in Vyavahar-anirnaya, 356-56.

5 Jolly, History of Hindu Law, 88 (1883) citing Mitakshara I. 1, 31 et sq

German Law also recognized the right of pre-emption as a form of obligation attached by written or customary law to a particular status which binds the purchaser from the obliged to hand over the object-matter to the other party to the obligation on receiving the price paid with his expense. The action was exercisable the moment at which the property was handed over to the purchaser. The law was called *Retractrecht* (jus retractus) and the right as *ex-jure vicinitatis* in the German law. The right was based upon a notion that natural justice required a preference to certain persons who had specified relations of person or property of the vendor.[6] The Islamic provision was a bit closer to the German law on points of its exercise, period required, and the devices used for its defeat.

In India, the law was introduced largely by the Moghul Empire, and still now separate customary laws of pre-emption are prevalent in different places, which have been given shapes of legislative enactments.[7]

The object of the law of pre-emption was to prevent the introduction of a disagreeable stranger as a coparcener or near neighbour, which may result from the sale of a property of a neighbour or relation. Further, it mitigated the inconvenience resulting from the minute subdivision of land under the rules of inheritance by following the different provisions of the law.[8] The Hedaya holds the right as repugnant to analogy as it involves the taking possession of another's property contrary to his inclination, and Bentham remarks on the right that, "He whom you suppose to have lost nothing by a forced exchange in reality has lost", by it.[9] It places an embargo on the free dis-

6 Mad. H. C. 26.

7 For the Indian historical origin see Digambar Singh V. Ahmad Said Khan 42 I. A. 10 (1914); for Statutary laws see Saksena, Muslim Law as Administered In India and Pakistan (1959).

8 Wilson, 68.

9 Ibid. 374.

posing power of owners of property, and may be criticised as injurious to public interest and contrary to the fundamental rights possessed by property owners [10] Yet it is a right, "founded on the supposed necessities of a Muslim family, arising out of their minute division of ancestral property, as the results of its exercise is generally adverse to the public interest, it certainly will not be recognized by this court beyond the limits to which those necessities have been judicially decided to extend," in India,[11] and for such reasons some jurists of the Sharia suggested legal devices to evade the law though others condemned them as abominable. [12]

§ 2 The Law of Pre-emption

DEFINITION

The original meaning of *Shufa* or pre-emption is conjunction. In the language of the law it is a right to take possession of a purchased parcel of land, for a similar (in kind and quality) of the price, that has been set out on it to the purchaser. [13] It is a right, which the owner of certain immovable property possesses as such, for the quiet enjoyment of that immovable property, to obtain, in the substitution for the buyer, proprietary possession of certain other immovable property not his own, on such terms as those on which such latter immovable property is sold to another person, and being a personal right remains neither transferable nor heritable. [14]

The definition clarifies that the right of pre-emption

10 Held unconstitutional in recent Constitutional cases (on statutory law) in India, see Bhau Ram V. Baij Nath AIR 1962 S. C. 1476.

11 Per Phear J. in Nusrut Raza V. Umbul Khyr Bibee 8 W. R. 309 (1862).

12 Fathul-Jalil, 295; Nailul-Maarib I. 142; Abdur Rahim, 275.

13 Baille I. 475; Ham. Hedaya, 574; Al-Majallah, 153; Abdur Rahim, 272-73; Milliot, 589 et sq.

14 Per Mahmud J. in Gobind Dayal V. Inyat Ullah 7 All. 775 (F. B.); Ameer Ali I. 712; see also Audh Behari Singh V. Gajadhar AIR 1954 S. C. 417: 1 S. C. R. 70 (1955).

being a feeble right, accrues only after the completion of a valid sale with a bonafide transaction. [15] There must be three conditions present in order to give a valid claim of rhe right. The first is that the pre-emptor must himself own property, secondly, there must be a sale of certain property, and thirdly, there must be certain relationship between the pre-emptor and the vendor in relation to the sold propery. [16] Upon the analogy of the definition, it is said that where the subject of a transfer of certain property which is given in consideration of the dower debt by a husband to the wife, is in nature of a sale transaction, the right of pre-emption revives. Other views hold that such a transaction is the nature of a *Hiba-bil-iwaz* and hence the law did not apply. [17] However, it is submitted that each case is a question of fact which depends upon its circumstances. The right comes into operation only when the vendor has actually sold the property, for until the contract of sale has been entered into, the matter resting solely upon his intention is not free from any uncertainty. [18]

PERSONS ENTITLED

The Majalla (Article 1008) considers three situations where the right can be exercised. The first is the joint ownership of the property involved, so upon the sale by one of the co-owner, the other co-owner has a right to purchase upon the price paid by the third involved party, secondly, holders of joint easements, for example joint roads, water rights, and joint beneficiaries of a private river can claim the rights, and thirdly, the rights related to immediate

15 Baillie I. 475 et sq.; Ham. Hedaya, 560.

16 Fyzee, 283.

17 See Tyabji, 677; see also Fida Ali V. Muzaffar Ali 5 All. 65 (1882); Bashir Ahmad V. Zubaida 1 Luck. 83 (1926).

18 Abdur Rahim, 273 citing Hedaya VIII; 304; for distinction between the nature of the right as 'substitution' or 'repurchase' according to judicial views of India, see Fyzee, 288; see the view of the Indian Supreme Court in the case cited in note 14 above.

owners. [19] The first category of persons are called *Shafi-i Sharik* or co-owner in the property, the second are *Shafii-Khalit* or participators in immunities and appendages, and the third are the *Shafii-Jar* or neighbours according to the Hanafi school. [20] The Shafii school holds that a pre-emption can be claimed only by co-sharers and not by participators in appendages, nor by neighbours, and even a co-sharer cannot claim the right if the property is incapable of division. [21] The Shia schools further hold that the right can be claimed by a co-sharer only where two persons jointly own a property and one of them sells his share, and and so in a case of more than one co-sharers, none can claim pre-emption. [22] The Maliki school vests a pre.emption to only a co-sharer. [23] In cases of competition between the different categories of pre-emptors, the rule is that the first excludes the second and the second excludes the third, but in cases where the pre-emptors remain of the same category, all of them have equal rights, under the Hanafi law, but according to their proportionate share of property in the Shafii law. [24] There is no distinction where the pre-emptors belong to the same class, but where two or more persons have equal contingent rights and a sale is made in favour of one of them, the others having, similar rights are entitled to claim pre-emption of their share, and the question that the vendee has an equal right of pre-emption

19 Articles 1009 to 1012 relating to persons who have priority in the right upon specified situations: Cf. Prof. Onar in Law In the Middle East, 302.

20 Tyabji S. 541; Wilson, Baillie I. 481; Ham. Hedaya 548.

21 Minhaj, 120, 205; Ham.H edaya 548.

22 Baillie II. 179; Query, 272; see however for right of a participator in appendage: Ameer Ali quoted by Taybji 736.

23 Perron, Pracis de Jurisprudence Musulmane IV. 420; Ruxton, Maliki law, 233.

24 Tyabji, S. 547; Fyzee, 290; see also Karim Baksh V. Khuda Baksh 16 All. 247 (1894).

is irrelevant. [25] A woman is entitled to claim the right, but not so if she is entitled to a mere maintenance, and similar is the case of a mutawalli suing on behalf of a wakf property. [26]

PROCEDURES AND FORMALITIES

The right of pre-emption requires certain formalities and procedures so that a valid claim may be allowed. Firstly, upon receiving an information of sale the pre-emptor must immediately declare his intention to assert his right. This is called *Talab-i-mowasibat* which means a demand by jumping.[27] In this formality witnesses are not required nor any special form necessary, but an unreasonable delay is construed against the pre-emptor.[28] Secondly, he should with the least possible delay affirm his intention in the presence of two or more witnesses referring specifically to the compliance of the first formality. Further he must make a formal demand either in the presence of the vendor if he is in possession of the property or of the vendee or upon the premises subjected to sale. This formality is called *Talabi-ishhad* or *Talab-i-takreer* or a demand with the innovation of witnesses. It requires no formula and an explicit expression of demand is considered sufficient.[29] In cases where the right is claimed by two or more persons, the law requires that each one of them must make the demand either on the property or in presence of the vendor or all the vendees. [30] The reason of the presence of the witness is required for the sake of proof for the

25 See Saligram V. Raghubardayal 15 Cal. 224 (1885); Nadir Hussain V. Sadiq Hussain 47 All. 324 (1925); see however Tyabji, S. 545.

26 Mulla, S. 231; Fyzee, 291; Mt. Girraj Kunwar V. Irfan Ali AIR 1953 All. 686; see however Wakf Banam Khudawand Karim V. Raj Kali 1937 A. L. J. 1337.

27 Baillie I 487; Ham. Hedaya, 550.

28 Tyabji, S. 528 A & B.

29 Baillie I 489; Ham Hedaya 551; Tyabji, S. 528.

30 See Mohd. Askari V. Rahimutullah A I R 1927 All. 548; 49 All. 716 (1927).

purchaser may deny the demand.[31] The third demand, is not really a demand but is a procedure of bringing an action in the court of law. Such an action is called *Talab-i-tamlik* or *Talab-i Khusumat* meaning the demand of possession.[32]

The muslim jurists have explained the positions where due to human nature some delay may be made in compliance of the respective formalities. They hold that if there was a good excuse for delay, such as absence from the locality or want of information and according to the Shafii and Hanbali schools even in ignorance of the rule which requires prompt action the right will not be affected. Similarly if the pre-emptor has been induced to desist from making his demand by misrepresentation with regard to the sold property or the price, the right will not be lost [33]

However the right may be lost or forfeited in cases where the pre-emptor enters into a compromise or otherwise acquiesces in the sale or omits to make the two demands as prescribed by the law. [34] Similarly the right is lost with misjoinder of parties in the suit, and also in cases of waiver of the right by the pre-emptor or where he before enforcing his right purports to dispose of the subject of the pre-emption to a stranger. [35] But if the waiver of the pre-emptor was due to misinformation as to the identity of the vendee, it remains ineffectual. [36]

The Sharia according to the Hanafi school holds that in the case of death of the pre-emptor, the right to sue

31 Baillie I. 489; see also Imamuddin V. Mohd. Raisul Islam 52 All. 1005 (1930).

32 Wilson, S. 375; Fyzee, 296; for the Indian procedures See S. 10 of the Limitation Act.

33 Abdur Rahim, 274-75 citing Nailul-Maarib I. 141.

34 Tyabji, S. 532; see also Habibun-Nissa V. Barkat Ali 8 All. 275 (1886).

35 Minhaj, 209; Tyabji, 536; see also Rajju V. Lalman 5 All 180 (1882).

36 Baillie I. 501.

is extinguished and the heirs cannot sue for it, but the Shafii and the Shia schools hold that the right is not extinguished and so the heirs can continue the suit.[37]

CONFLICT OF LAWS

The general view of the Sharia is that when a *Dhimmi* or a person of the Scripturaries purchased a property from another person of the same religion with payment of price in wine or pork instead of money, the right of pre-emption remains valid, and similar was the case where the pre-emptor was a *dhimmi*, for there was no bar if he substituted himself for the purchaser for he may pay the latter the quantity of pork or wine (both prohibited in Islam), which he had given for the purchase of the building. But if the pre-emptor was a muslim, the law applied was the Sharia, and the purchaser could not be given wine or pork for the payment must be in money.[38]

The law as applied in India, possesses an agreement that in order to establish a right of pre-emption the vendor and the pre-emptor should both be Muslims, but difference of opinion arises in the judicial views on the question whether it is essential to enforce the right that the vendee should be a muslim.[39] However some courts take the view that the personal law of the purchaser does not affect the dispute in question, and hence, they hold that it is not essential to enforce the right that the vendee must be a muslim.[40] On the other hand other courts, took the view that the right cannot be claimed unless the purchaser is a muslim except when the right is recognized by custom

37 Baillie I. 505, II. 190; Ham. Hedaya, 561; see S. 306 of the Indian Succession Act of 1925 under which the right is not extinguished.

38 Prof. Cardahi in Law In the Middle East, 340 citing Fatwai al Hindiyya V. 382.

39 See 7 All. 287, 793; Wilson, S. 357; Tyabji, S. 524.

40 See 7 All, 775; Mahmood Hasan V. Bhikari Lal AIR 1953 All. 705; Achulananda V, Beki Bibi 1 Pat. 578 (1922).

or arises on the basis of a valid contract.[41] However, on the basis of the theory of law the first view seems sound.[42]

In the cases of conflicts between muslims themselves due to the difference of sects, the law requires that where both the vendor and the pre-emptor belong to same sect, the right is determined by the law of the sect but where the seller is a Sunni and the pre-emptor remains a Shia, the right is to be determined according to the latter's sect for the Shia law is the narrower law regarding the law of pre-emption.[43] If the vendor belongs to the Shia sect but the pre-emptor remains a Sunni, some courts hold that the right is to be determined by the Shia law, while others hold for the Sunni law, but the agreed view is that the sect of the vendee has no bearing in such cases.[44]

LEGAL EFFECTS

Upon the enforcement of the right of pre-emption, the pre-emptor stands in every respect in shoes of the buyer and hence takes the property with prior encumbrances, but in cases where the sale has been completed, the original purchaser becomes the new vendor and the pre-emptor the new buyer. Hence, the original purchaser is entitled to receive or retain the rents and mesne-profits between the date of the sale to himself and the date of the transfer to the pre-emptor.[45] However in India the statutes also regulate the law which is beyond the present scope, so the readers are recommended to consult the text-books on Mohammadan a w.

EVASIVE DEVICES

It is a fundamental policy of the law which holds that

41 Kudratullah V. Mahini Mohan 4 Beng. L. R. 134; Sita Ram V. Syed Sirajul 41 Bom. 636 (1917).

42 See Jog Deb V. Mahomed 32 Cal. 982 (1905)

43 See Qurban V. Chote 22 All. 102 (1899).

44 See Pir Khan V. Faiyaz 36 All. 488 (1914) (for Shia law); for Sunni law see 7 All. 775; Jog Deb V. Mahomed 32 Cal. 982 (1905).

45 Fyzee, 298-99; Tyabji, S. 549.

sales for avoiding the right of pre-emption by resorting to legal devices as based upon the principles propounded by Islamic jurists are abominable, yet every such device which a man may employ for obtaining a delivery from what is unlawful and attaining what is lawful is held good.[46] Bearing this principle in view, it can be said that in respect of the right of pre-emption it is considered as a clog on the right of the owner of the property rather than an independent right of the prospective pre-emptor, hence, the ultimate result is that a legal device is not considered to be objectionable or immoral, though it may be considered as unmoral. But the legal devices should be distinguished from fabrications. The principle upon which it is based is that Islam condemns falsehood strongly, and hence no amount of fabrication if established can defeat the right of pre-emption.[47]

However, the jurists disagree upon the evasive legal devices in the right of pre-emption, for though Abu Yusuf upheld them, yet Muhammad condemned them as abominable.[48] Yet, the devices are held valid, for a right of pre-emption of a neighbour, though not of a co-sharer or participator in the appendages, may be defeated by the vendor reserving to himself a strip of land or house, however narrow, contiguous to that owned by the neighbour in question.[49] Though there are various devices recognized by the Sharia to evade the right, yet in the case of India the above only seems to be permissible, and even it cannot be adopted by dressing up a sale in the garb of a lease.[50]

46 Baillie I. 511

47 See Jadai Lal Saha V. Janki Koer 35 Cal. 575 on appeal 39 I. A. 101: 39 Cal. 915.

48 Fyzee, 299-300; Ham. Hedaya 563.

49 Wilson, S. 391 p. 404; Macnaughten, P. P. M. L. 49; Ham. Hedaya, 563; Baillie I. 505.

50 Muhammad Niaz Khan V. Muhammad Idris Khan 40 All. 322 (1918); see also for critical comments: Mahmud J. in 7 All 775, 814 (1885).

XII

The Law of Tort and Crime

§ 1 Preliminary Observation

The purpose of a tort according to the Common law is to protect the rights which are related to person, property and reputation possessed by an individual by providing compensation for the wrongs infringing such rights. In the law of crimes, a wrong has a punitive sanction behind it without any remission on the part of a private person but only through the state.[1] The same act of a person may be a tort from one point and a crime from another point of view. As for example, if a person assaults another person, he will have to pay compensation to such injured person, and also will be punished by the state for the safety of society.[2] The person incurring the wrong may be ordered to make compensation through a civil action, and be also punished criminally by fine or imprisonment.

The Civilian system, as for instance under the French legal system, the criminal law is a subject for the *privatistes* rather than *publicistes*, not only in offenses relating to person or private property, but also to those which involve property. With the exception of the constitutional offenses, the whole approach remains of the private law.[3] However, the common law systems have a growing tendency in modern times, with broad principles of liability for its general extension of fields in order to give greater protection to personal rights even in the

1 Cf. Kenny, Criminal Law, 16 (15th. Ed.); see also Salmond, Ch. 4 (11th Ed.).

2 See Winfield, A Text-Book of the Law of Tort, 5 (4th. Ed.).

3 David and Vries, The French Legel System, 56; Ancel, Collection of European Penal Codes and the Study of Comparative Law, 106 U. of Pa. L. R. 329 etsq. (1958).

absence of an injury to a property in strict sense.[4] The major problem of the criminal law today, is to see what behaviors should be made criminal and what must be done with the persons who commit crimes with a consideration of the ultimate aims and ends.[5] The social interests today require the law to take care of the general security, the security of social institutions, the general morals, the conservation of social resources, the general progress, and the individual life, and the ultimate aim of the criminal law is the creation of a body of laws which remain adequate to securing social interests with a capacity of high average of observance and enforcement.[6]

The jurisprudence of Islam had a very thin line to divide a wrong which is a tort and a crime. The line often remains very narrow for there are combined rights of individuals and the general public. The basis of the theory is in the term 'Law' itself. As a law controls the conscious actions of the people, it denotes a freedom and ability to do or to abstain from doing an act, and controls such actions, measuring them through the medium of rights and obligations. It mixes the religious, moral and secular factors on the theory that every communication from God is law, and upon this, the liability to any specified conduct exists. The test is, to search out the person in whom the law grants the remedy. If the remedy is granted in favour of the individual, such a rule of conduct is called Tort, otherwise, if the remedy is

4 Paton, 384 etsq.

5 Michael and Wechsler, Criminal Law and Its Administration, 6; Ploscowe, Examination of some Dispositions Relating to Motives and character in Modern European Penal Codes, 21 J. Crim. L. 26 etsq. (1930); Teeters, International Penal Congress (1910) and the Indeterminate sentence, 39 J. Crim. L. 618 etsq. (1949); Harno, Some Significant Developments in Criminal Law and Procedure in the Last Century, 42 J. Crim. L. 427 etsq. (1951).

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granted in favour of the general public, it is the field of Criminal Law.[7]

One of the many reasons of a blameworthy conduct of an individual is the greed of property and wealth, such a person without labouring to earn money may by force snatch other's wealth and property. For such people the Quran expressly prohibits for consumptions of other people's property and their wrongful appropriations thereof (see II. 188). The law lays down the violations of other's rights and makes it a liability under its provisions of blameworthy conducts. Similarly, the law sanctions punishments as the Quran says, "wherefore judge thou between them by what God has revealed, and follow not their lusts; but beware lest they mislead thee from part of what God has revealed to thee; yet if they turn back, then know that God wishes to fall on them for some sins of theirs, verily many men are evildoers." V. 54 (Palmer's transl.).

Upon the above theories, the fundamental principle requires that rights must be exercised by a man in accordance to the limits ordained by the law. If the rights are not exercised as such, such conduct may cause serious damage and injuries to others may result. If such injuries result to private individuals, a person is held liable in the law of tort. If the injuries result to the rights of the general public such general public has a remedy against such conduct and it may take the form of crime and so punishable by the law.

§ 2 The Law of Tort

THEORY AND DEFINITION

The Common law system puts various views about the law of delict or tort. The simple way to define the law, is that, "it is civil wrong which infringes a right in

7 Abdur Rahim, 351.

rem and is remediable by an action for damages." [8] It may be an act or ommission related to the infliction of harm upon a determinate person in various ways. [9] The liability under it may "arise from the breach of a duty primarily fixed by the law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages." [10] In the French Civil law, "A delict is an unlawful act infringing the right of another and causing damage, such act being imputable to its author, and not constituting the fulfilment of some legal obligation on his part, or the exercise of a right. And the act must be done knowingly, and with the intent to cause injury." [11]

In the Islamic Sharia, a tort is generally called *Janayat*, which is applied to injuries illegally inflicted on human body. Such injury may result in death, grievous hurt or a simple hurt only, and hence it gives rise to the liability to make compensation, along with other liabilities. [12] The principle is based upon the fundamental rule of law that the exercise of a right must not cause an injury to others. The Sharia schools are divided and similar are the views of modern systems upon the fact as to whether the harmful exercise of rights is prohibited and gives rise to the liability of such blameworthy conduct. Imam Abu Hanifa and Shafii give a negative reply to such a question on the basis that rights of a person are of absolute nature, while Imam Malik, Abu Yusuf and others hold that such injurious

8 Paton, 372.

9 See Pollock, Law of Torts, 14 etsq. (15th Ed.).

10 Cf. Winfield, Province of the Law of Tort, Ch. VII; see also Prosser on Torts (1955); Salmond on Torts (10th. Ed.); for Civil law, see Notes on the History of Tort in the Civil Law, 22 J. Comp. Leg. & Int. L. (3rd. Ser.) 136 etsq. (1940); for Soviet law, see Holman & Spinner, Bases of liability for tortious injury in Soviet Law, 22 Iowa L. R. 1 etsq. (1936).

11 Aubreyet Rau, Cours de Droit Civil Francais VI. 337 (5th Ed.) cited by Paton, 372.

12 See Abdur Rahim, 352.

exercise of the rights are prohibited under the rules of the Sharia, and this view has been accepted by the Majalla of the Ottoman Empire.[13] However, the better position seems that if the result of the exercise of such rights is frought with grave danger, the exercise of it is prohibited irrespective of any intention and motive for it.[14]

The Quran says that, "And covet not the thing in which God had made some of you to excel others" IV. 32, and upon this principle the rules of the Sharia prohibit that no person should deal with other's properties without permission, and similarly neither a person should take other's property without legal cause, nor wrongfully appropriate or destroy their properties. Such acts are forbidden by the law and upon their commission, a person is held responsible and liable in the law.[15] The principle of liability arises in such matters upon the fact that the law looks to the loss caused to the person injured, instead of with the moral culpability of the person by whose act it is caused.[16]

KINDS

The western writers are not unanimous upon the classification of torts, for torts are infinitely various, and are not confined to a specified limit. Some jurists divide the law into two portions as intentional or unintentional torts with subdivision of each.[17] Others divide it into those relating to person, those relating to property, and those which remain common to both.[18] Further, the law may be analyzed on the principle of liability itself. Here it may take the shape of strict liability, vicarious liability,

13 Mahmasani in Law In the Middle East, 186 etsq.
14 Ibid.
15 Ibid; Torts on Property by Mohd. Ghouse, 3-I1 (1940) in Urdu.
16 Abdur Rahim, 353.
17 See Prosser on Torts (1955) for the American classificatin.
18 See Ratan Lal. Law of Torts, 133 (17th. Ed. 1957); Walton, Delictual Responsibility in Modern Civil Law, 49 L. Q. R. 70 etsq. (1933).

liability for negligence, liability only where a specific subjective element is present, and *damnum sine injuria*.[19]

Upon a review of the definition of the Sharia, a tort when seen in terms of property rights and their violations, may be in the nature of usurpation or wrongful appropriation called *Ghasab*, or destruction or injurious called *Talaf or Nuqsan*. When such infringements of other's rights are caused in relation to his freedom of action by way of coercion of will it is called *Ikrah*, or through misleading his judgment called fraud or *Taghrir*.[20]

As noted above, the law looks the damage caused to the injured person instead of the moral culpability of the person causing such an injury. It gives rise to liability irrespective of the act being intentional or accidental. But if the two causes which are preparatory and effective arise from the acts of a free agent and remain separate from each other, the general rules of moral culpability applies and the person is held liable to the injuries. If the immediate cause was due to an act of a human being, as for example, the collection of water on one's own land, and by its discharge the neighbouring property is injured, the liability for such an injury and loss will arise. This rule is similar to the English doctrine of strict liability of the Rylands case.

TORTS RELATING TO PROPERTY

The general rule of Sharia prohibits a man to deal with other's property without consent or as a trustee. Hence, if any person forcibly takes a valuable thing from another person or property without consent or authority, and destroys the proprietor's possession, such an act is called

19 See Paton, 378 etsq.; Morris, The Proper Law of a Tort, 64 H. L. R. 881 etsq. (1951).
20 Abdur Rahim 352; for a critical comparative analysis see, Torts on Property by Mohd. Ghouse, 248 etsq. (1940); I Al-wajiz, 205; II Hedayat-ul-Mujtahid, 265.

Ghasab. If he does such an act knowingly and wilfully, he is held in law to be an offender and has to pay compensation. But if he does not do so with knowledge and intention, as for example, where a person destroys other's property upon a supposition that it belonged to him, though held later otherwise, the law does not hold him as offender but still he is held responsible to pay compensation, on the principle that a compensation is the right of man.[21] The law provides further that the actual article usurped must be restored to the proprietor if it be extent in his possession, and if he puts the plea of loosing the thing, the judge will have to imprison him till he recompensates the loss.

An usurpation in order to be legally blameworthy has been limited to movable properties according to the views of Imam Hanifa and Abu Yusuf, who hold that an usurper is not responsible to land, for such a destruction cannot take place by removal in the case of land. Imam Shafii and Muhammad holding to the contrary say that as an usurpation means the annihilation of the propietor's possession, and the establishment of the usurper's exists in the case of land also, hence a land is same as a movable property so as to give rise to the usurper's liability.[22]

The essential conditions to be fulfilled to give rise to a liability for unlawful destruction or usurpation of another's property are:– (I) the act itself must be injurious including negligent acts, (2) the injury must be unlawful, (3) it must be the direct or indirect result of aggression, and (4) where it is caused by animals or inanimate objects, it must be intentional to cover the cases of neglect and carelessness, but if a direct injury results

21 Ham. Hedaya, 533; Torts on Property by Mohd. Ghouse (1940) for elaborate comprehensive discussions in the light of Western principles and their critical comparative analysis with the Islamic counterparts.

22 Ibid. 534.

the intention is not material.[23] The basis of the rule is illustrated in the case where, "a person who is the direct cause (of an injury), even though not intentionally is liable. But a person who is the indirect cause (of an injury) is not liable unless he has acted intentionally".[24]

Elaborate rules have been laid down by the Sharia in the law relating to usurpation.[25] However, the subtle eyes of the law hold that if a muslim, destroys wine or pork belonging to a *Zimmee* or non-muslim, he must compensate for the value of the same, but he is excused if he does so with a muslim. This is the view of the general Sunni school, but however Imam Shafii maintains that he will be not liable in the previous case also.[26]

COERCION AND FRAUD

The above principle of liability is applied in the law of coercion also, for if a loss results to the coerced person in doing a particular act, the person so coercing is held liable to make compensation. Similariy, if a victim of fraud incurs any loss, the wrongdoer must pay compensation to him, for the principle is that a person committing a fraud is not allowed to derive any advantage from his own wrong.[27]

REMEDIES

The remedies provided by the Sharia for torts are compensation or *Diat*, *Irsh*, and retaliation, *Qisas* or *Qawd*, in cases of infringement of an individual's rights relating to the safety of person, and for the violation of his proprietory rights, and for wrongs to a person's prestige

23 Mahmasani, 190.

24 Ibid. 191 citing Ibn Nujam, al-Ashbah Wal-Nazair, 113; Articles 92, 93 of the Majalia; Mahmasani I. 198; Goadby, Moslem Law of Civil Delict as Illustrated by the Mejelle 21 J. Com. Leg. & Int. L. (3rd. Ser.) 62 et sq. (1939).

25 For details see Ham. Hedaya Bk. XXXVII. 633 et sq; Al-Mabsut XI 49.

26 Ibid. 544.

27 Abdur Rahim, 355-358; 5 Cal. L. J. 55n-56n (1907).

and fame. Such wrongs are often related to the general public and are treated under the general criminal law.

§ 3 The Criminal Law

THEORY AND DEFINITION

According to the Western Common law, a crime is, "a wrong the sanction of which involves punishment; and punishment signifies death, penal servitude, whipping, fine, imprisonment or some other evil which, when once liability to it has been decreed, is not avoidable by any act of the party offending".[28] It is a criminal behaviour in violation of the criminal law, which is a body of specific rules in relation to human conduct promulgated by political authority, and applied uniformly to all members of the classes being enforced by punishments, administered by the sovereign authority.[29] Thus the nature of criminal law is twofold. On the one hand, it is made up of commands and prohibitions addressed to the individual in order to secure social interest, and on the other hand, it is made up of limitations upon the enforcement of those commands and prohibitions in order to secure the individual life.[30] It stands to the passion of revenge in much the same relation as marriage to the sexual appetite in a given society.[31]

To avoid such conducts from society, the law inflicts punishment so that the greater evil of private retribution and violations of social and individual rights may be avoided. According to Hegal, every wrong is a negation

28 Winfield, Province of the Law of Tort, 200; see also Kenny, Criminal Law, 16 (15th. Ed.)

29 Sutherland and Cressey, Principles of Criminology, 4 (6th. Ed.); Prof. Remington, etc, the Criminal law And Legislative Process, 1960 (1) Current Problems in Criminal Law 481-499 Univ of Ill. Law Forum).

30 Pound, Criminal Justice in America, 57.

31 See Sir James Stephen, General view of Criminal Law, 99; Holmes, The Common Law, Lect. II.

of a right, a punishment is the negation of that negation. Regarding the purpose of punishments, jurists and schools of jurisprudence have developed theories of punishments, having a major emphasis either to reform the offender, or to deter him, or to give him an equal retribution of his wrongful conduct.

Under the Sharia of Islam, the criminal law having a social function is a part of the general public law, upon the violations of public rights, the law grants the remedy by way of punishment which is called *Uqubat*, and the wrong causing such a violation is called *Maasilat*. As the legal system mixes up the principle of personality and territoriality of the law, an offender is always indictable whether he resides in the country of the commission of the offence or abroad. This principle is very close to the territorial and personal criminal jurisdiction of other legal systems.[32]

The Islamic Sharia defines in clear terms offenses and their punishments similar largely to the West, for offenses relate mainly to property, human body, reputation, religion, the sovereign authority, public peace, tranquility, decency and morality which are common to all modern legal systems. The Quran explicitly declares that, "who so will not judge by that which God had revealed: such are wrong-doers." V. 45. Similar to the modern views that the punishment of criminal conducts are not made punishable if not so before the enforcement of a law, the Sharia holds that wrongful conducts not punishable before the revelation would not be indictable upon the advent of Islam. The

32 Compare S. 4 of the Indian Panal Code, 1860 which says that, the provisions of this Code applies to any offence committed by any citizen of India in any place without and beyond India, for an offence includes every act committed outside India which if committed in India, would be punishable under the code; see also on Extradition, Stephen's History of the Criminal Law of England, II. 65 et. sq; see Riyad Mydani in Law In the Middle East, 223.

Sharia is more concessional, for it holds that acts which were prohibited before Islam were not to be punished later by Islam. The Western Maxim '*Nulla Poena sine lege*', may be hence, compared with the Islamic law too.

The law holds that a criminal conduct must be a personal responsibility of the criminal himself, for the principle is stated in the Quran, that, " .. ..but no soul shall earn aught save against itself; nor shall one bearing a burden bear a buden of another." VI. 164; for the general rule of the Sharia as contained in the Quran runs that, "Every man is pledged for what he earns", LII. 21 (Palmer's transl.). Yet the law upon certain circumstances, holds the family of the offender responsible to pay compensation resulting from damages from the commission of the crime to the injured man. The public policy coupled with the benefits derived by the family from the acts of the offender may be the main consideration in holding the family liable in compensation.

As in the modern systems, the law of Islam attached no responsibility to the insane, and the minor, for the method adopted in such cases favoured the American reformative and treatment systems coupled with other reasons of natural justice. The law holds such persons to be incapable of understanding and so it gives them an exemption from liability. Abu Yusuf taking into consideration such lack of understanding said that, "the *Hadd* cannot be imposed on the accused after his confession, unless it is made clear that he is not insane or mentally troubled".[32]

Similarly if a pregnant woman committed an offence punishable by a hadd punishment, the law provided that she cannot be put to death by stoning, but for the sake

33 Riyad Mydani, 225 on basis of Abu Yusuf's Al-iqrar; compare Ss. 82,83,84 of the Indian Penal Code (1860); see Biggs. Jr., Procedures for Handling the Mentally Ill Offender in some European countries; 29 Temp. L. Q. 254 et. sq. (1956); R. H. Kuh, The insanity defence-An effort to Combine law and reason, 110 U. Pa. L. R. 771 (1962).

of the child in her womb she should be imprisoned to be later punished according to the law after the child is delivered.[34] The law of self-defence and benefit of doubt in acquitting a criminal from punishment which are well-recognized in every civilized system, were duly recognized by the Sharia. The Quran says that, "..... And he who helps himself after he has been wronged, for these there is no way against them.....". XLII. 39 40 (Palmer's transl.).[35] Similarly offenses committed under duress and mistake have been exempted from punishments, for the tradition of the Prophet clearly excuses conducts under such conditions.

CLASSIFICATION

In the Western Common law systems, a criminal conduct is generally divided into offenses of violence against the person, property, and the state. Crimes depending upon the nature and degree of seriousness, are generally divided into felonies (which are serious offenses) and misdeameanours which are all other than felonious offenses.[36] In the Sharia of Islam crimes are legal prohibitions, imposed by God and made punishable by the penalty of *Hadds* or fixed punishment or by *Tazir*, which is discretionary in the hands of the judge. The hadd punishment is attributed to the Quran itself in V. 49. The tazir punishment by its very name shows a discretion vesting in the judge, with the proviso that it must be confined under the limits of a hadd punishment.

34 Ham. Hedaya, 181; compare S, 382 of the Criminal Procedure Code (India).

35 For an Egyptian fatwa see Jl. of the Egyptian Bar Assoication, VII. 146 cited in Riyad Mydani, 225; compare Ss. 299-300, Exception 3rd. of the I.P.C; note S. 72 I.P.C.; see Abdur Rahim, 362; compare Articles 46-54 Italian Penal Code, 1930; For U.S. and others see, Appendix of Michael & Wechsler, 1269 et. sq.

36 See generaly Michael and Wechsler, Criminal Law and Its Admn. (1940, with 1956 Supplt,); for India see the Criminal Procedure Code (1898) (with Schedule II.); the Indian Penal Code (1860).

HADD

Upon a review of various provisions in the Quran, it can be said that the hadd system relates to crimes against body, (including homicide and physical injury), against family and morality (including fornication or false charge of adultery, defamation, slander etc.), and crimes against property in relation to theft, and robbery. The punishments by way of hadd are either by way of death by stoning, amputation of limbs and flogging. As this form of punishment resembles the modern retributive and deterrent theories of punishment, it is accepted that Islam inflicted them only in rare cases by taking into consideration the developing public opinion. Still such punishments are more humane in nature than those in European systems which were attacked by Beccaria and Bentham on grounds of arbitrariness and barbarity. The punishments were even mitigatable in cases of doubt or *Shubhat-ul-fail*, where the offender misconceived the law, or where there was an error in subject of the application of the law or *Shubhatul-mahal*. Upon such cases the law provided the remission of such penalties.[37] But the law took the social considerations in view, where the offenses were against public morality, decency and the like, by requiring the proof by four male witnesses.

The hadd punishment was specifically attractive in relation to sexual crimes, upon the fundamental principle of the Sharia stated in the Quran that, "The whore and the whoremonger—Scourge each of them with a hundred stripes and do not let pity for them take hold of you in God's religion, if ye believe in God and the last day; and let a party of believers witness their torments." XXIV. 2 (Palmer's transl.). The law provided further by keeping

37 Abdur Rahim, 362; compare Civil Law, Jolowicz, Some observations on the Civil Law Attitude Towards Self-Redress and Self-Defence; 28 Tul. L. R. 281 et. sq. (1954).

in view the nature of circumstances and persons committing the offence. If the offender was a married person, the punishment must be death, while a concession was made for an unmarried person. Similarly, the law provided that the accusers of adultery, must be punished with scoarging upon their failure to produce evidence in proof.

The Sharia inflicted punishments for theft, but it punished heavily for highway robberies and endangering public peace and security. The basis of it may be seen in the Quran (see V. 33, 34). From the Quranic provisions, the jurists agreed to entrust the judge to impose the punishment upon conformity of the criminal conduct or to suspend the sentence for those who confessed the guilt and surrendered themselves, and it is submitted that here lies the similarity of mitigative and reformative theories of punishment prevalent in the modern world.[38]

TAZIR

Of punishments not coming under the fixed sentencing provisions were those which in the law signify an infliction undermined in its degree by the law on account of the right of God, or of an individual, in relation to offenses in words or in deed.[39] Such punishments were called *Tazir* being inflicted upon offenses against human life, property, public peace and the like and mainly upon the general structure of the Islamic criminal law. The words tazir itself denotes the various kinds of admonitions reprimanded by the judge upon an offender and being discretionary was less severe than

38 See Riyad Mydani, 231; compare the view on 'Criminal Procedure' of the American jurist, Prof. Frank J. Remington that, 'The dominant method of sentencing in the United States is to give the trial judge entire discretion as to the type of sentence (typically the choice is between a money fine, probation and imprisoument) and to have the judge share responsibility for determining length of incarceration with an administrative agency, usually a parole board": Cf. Freedom of Information (4th Annual Conference), Univ. of Missouri, p. 3-4 (1962).

39 Ham Hedaya, 203

the hadd punishment. Various reasons have been advanced for a tazir sentencing and one of such reasons is that the laws of the Quran sanction religious obligations upon a Muslim such as the prohibition of drinking wine, infringements of the rules of prayer, etc., and hence cases of such violations must be disposed off by the discretion of the judge.[40]

In the West, especially in the United States, the judge determines the sentence, and the character and the presentence report of the offender plays a significant role in determining the punishment to be awarded, with due regards of giving an opportunity to the accused for a hearing on it with safeguards for probations and parols.[41] The Court also takes into consideration with an assessment of the deterrent effect of a particular penalty which would appear to vary with the individual in his training, background, ability to expiate, powers of rehabilitation and the extent to which a crime may be considered morally wrong under the particular circumstances.[42] In the Sharia of Islam, the objects of a tazir punishment are the correction of the criminal and the prevention of the recurrence of the crime. The law leaves the matters of sentencing an offender upon the discretion of the judge, to decide the proper sentence to be awarded by keeping in view the circumstances of each case, for a sentence by which the

40 Abdur Rahim, 363; Abdus Salam Nadvi, 146 et sq.

41 See Prof. Remington, etc., "Crime and the American Penal System" in the Annals of American Academy of Political and Social Science," 139 (January, 1962).

42 See Congressman Emanuel Celler in 'Pilot Institute on Sentencing' under the auspices of the Judl. Conference of the United States, 244 (July 16-17, 1959); see The Admn. of Criminal Justice in the United States (Pilot Project Report of the American Bar Foundation, 6 Vols 1959); note Ss. 562-564 etc. of the Criminal Procedure Code (1898, India); Ss. 54,55 etc of the Indian Penal Code (1860); The First Offender's Probation Act, 1938 (U.P.) and other similar enactments.

object of the law would be best achieved. The judge in the Sharia remains bound to take into account in awarding a punishment, the nature of the offence with its circumstances of commission, the previous history and character of the criminal and other related matters.[43] The Quran sanctions that, "fair play must be made in administering justice," and so the Sharia takes into consideration the social engineering values of the people as a whole, and upon this principle, it may award by a tazir sentencing, punishments from a mere warning to fines, corporal chastisement to imprisonment and transportation, depending upon the circumstances of each case.[44]

43 Abdur Rahim, 363.

44 Ibid. citing Raddul-Muthar III. 194; note Ham. Hedaya 203 et. sq; Abdus Salam Nadvi, 152-153.

XIII

The Law of Procedure and Evidence

§ 1 Preliminary Observation

In the Common law system the law relating to procedure and practice are defined as the body of rules that govern a particular process of litigation, making or guiding the *Cursus Curiae*, and regulating, the proceedings in a cause within the walls or limits of the court itself.[1] The rules of evidence are for the proper regulation of the process of the court, and the method by which a right is enforced decides the nature of such right, so a procedure becomes almost an end in itself as the substantive law becomes gradually secreted in the interstics of procedure.[2] Upon a functional analysis to which all procedural rules must be tested is their practical efficiency in providing machinery which must settle disputes cheaply with proper justice between the disputing parties.[3] It is said that, "the substantive law which defines our rights and duties is, of course, important to all of us, but unless the adjective law of procedure is a working machine, constantly translating these obligations in terms of court orders and actual execution, the substantive law might just as well not exist."[4] Not only the adjective law of procedure is of importance for a lawyer but the actual action in the courts too, deserves attention, for every one who practices in the court will have to agree that often difficulties are felt by them by reason of the launching or conducting of a particular case as the complaint is always based not upon mere technicality but upon a matter of real importance

1 Per Lord Westbury in A. G. V. Sillem 10 H. C I. 723 (1864); Paton, 474.

2 Maine, Early Law and Custom, 389; Paton, 475.

3 Paton, 477; see also Salmond, Ch. 22 (11th. Ed.).

4 Ibid. citing Harvey, 7 Mod. L. R. 49 (1944).

and substance, such as some grave defects of pleading, omission to call the plaintiff or defendant or some necessary witness or of deliberate witholding of documents or books of account.[5] There are various defects in the modern adversary system and though it provides efficiency in the administration of justice, yet various modes for improvement for cheap, quick, and effective justice have to be developed and adopted. In the Civil law countries, as in France, the procedural and evidenciary matters being codified, the legal system is one of extreme specialization, for the French *Avocat* (lawyer) advices clients and argues before the Courts, but he does not do the paper work involved in the litigation.[6] The civil proceedings have two stages, the first is the preparatory proceeding in which the parties file informal pleadings and offers of proof and then appear before a single judge for purposes of clarifying the issues and for other purpose in relation to the pre-trial hearing, secondly, the trial is concentrated into one "day in court." The Civil law system freed the courts from the fetters of artificial restrictions on the admission of relevant evidence, while in the Common law such restrictions are necessary for a proper functioning of the jury system and for an efficient justice beginning from the commencement of an action, pleadings before trial, to the final stage of judgement in the procedure of civil cases.[7] To overcome such technical problems arising from the diversities in mutual intercourses of the modern international communities, which often defeat the ends of justice, is one of the truly urgent tasks for Western lawyers today.[8]

5 Chief Justice Grimwood Mears in Shibdayal V. Jagannth 20 A. L. J. 674.

6 Schlesinger, 203; Simmons, French Lawyer's Special Fields, 30 Tul. L. R. 101 etsq. (1955).

7 Ibid. 250 et sq.

8 See Harry LeRoy Jones, International Judicial Assistance, 62 Yale L. J. 551 (1953).

The modern laws relating to procedure leave very little or no discretion on the courts, for the rules of procedure and evidence are laid down in the codes, and owing to the technicalities, often it happens that they may for the sake of eliminating uncertainties are likely to have the effect in many cases of defeating their own subject, namely, a correct and right decision of the claim.[9] In the Islamic system, the right and the remedy asked judicially are either public or private, and the procedural rules governing the two, are more or less with slight variations remain the same. The law courts are single-judge courts without having many benches or juries. The proceedings are simple, and often the plaintiff may bring the defendant into the court for a remedy against him. The judge or the Qadi begins his examination of the case after seeing all the facts of the case. He is an official who has a delegated authority from the Caliph, the temporal and religious head of the state. He decides the case upon taking testimonies of the witnesses, and other documentary proofs, and has to dispose of the case speedily.

A suit must be brought by a specified person having full legal capacity to sue, and his claims must be in conformity to the legal rules prescribed by the law, with the selection of a proper court. The defendant has the right to reply to the plaintiff's claim, and the Qadi has to give a judicial decree reviewable on principles of law and enforceable through the agency of the court. The whole of the judicial procedure is called *Aadaab-ul-Qadi* and the rules of evidence as *Qanune-Shahadat* in the Islamic legal theory.

§ 2 The Law of Procedure

The whole Islamic law of procedure may be divided as a comparative method into the following along with

9 Abdur Rahim, 365; Nakamura, The Science of Civil Procedure Past and Present, 4 Jap. Sci. R. 109 et sq. (1953).

some minor parts :—

1. The structure of courts and judges or Qadis;
2. The claim and the parties to a lawsuit;
3. Pleadings and o her procedure prior to trial;
4. The trial;
5. The judgement;
6. The review;
7. The enforcement of the judgment or order.

1 THE STRUCTURE OF COURTS AND JUDGES OR QADIS

In the Islamic legal theory the judicial tribunal is ordinarily composed of only one judge, for it has been said that in cases where there are two judges the objection arises that one judge cannot be a half judge.[10] The only possibilities in which more than one judge could be appointed are firstly, in cases where judges are appointed by consideration of a territorial district, secondly, by a separation in the matters and types of jurisdictions, and thirdly, in the cases of concurrent jurisdiction holding their courts separately.[11] As the legal theory of Islam is mixed with law and religion, the judge being a delegate-representative of the Caliph, so the administration of justice always remains a vital principle of religion, and the exercise of the judicial function remains a religious duty. It strengthens the position and power of the judge who had to administer justice perfectly.

The judge, must be free, sane, adult, Muslim by religion, unconvicted of slander, and of good character.

10 Prof. Emile Tyan in Law in the Middle East, 245 citing Kharashi op cit. VII 196; Prof. Anderson in 41, the Muslim World, 34-48 (1951) for recent developments in the Middle East.

11 Ibid. citing Mawardi, op. cit. 123; compare Ss. 15-21 of the Civil Procedure Code, 1938 (India); for Europe See, Neserius, The Judiciary under the New Constitutions of Europe, 7 Am. L. School R. 537 et sq. (1932); for English Law see, The Judicature Act, 1873; Odger, Pleadings and Practice (1946).

He must be a competent and learned man and his appointment must not be solicited or coveted, and being accompanied by his usual officials, must not accept any present except from intimate friends and relatives. He is prohibited to go to invitations, in feasts or entertainments given by the interested parties to a suit.[12] The judge is to be appointed by the state from the general public among the people of the above qualifications, and a woman may also be appointed a judge in all cases of property.[13]

The judge or the Qadi administered the ordinary justice and was bound by procedures, while the other officials and magistrates who represented other categories of the law and its administration, were called *Al-mazalim*, who worked more or less independent of court procedures, being based on judicial discretion.[14]

The judicial function in Islam has been more or less divided into, the settlements of issues in suits, their enforcements, protection of the weak, the administration of dedicated properties, the execution of wills, the care of unmarried woman without guardians, inflictions of punishments, maintenance of public roads and buildings, and the general administration of the institutions of Courts.[15]

As regards the selection of jurisdictions to bring an action the proper court was one which had jurisdiction to hear the suit, which may be in addition to the specified jurisdictions of the judges was for the plaintiff, who may bring an action in the court within whose local jurisdiction he and his witnesses reside, irrespective of the situation of the subject-matter of the litigation and the residence of

12 Ham. Hedaya, 334 et sq.

13 Fatwai-Alamgiri; Ibid. 341.

14 Prof. Tyan in Law in the Middle East, 259.

15 Prof. Tyan, 261-262; see for a comparison, Conture, The Nature of Judicial Process, 25 Tul. L. R. 1 et sq. (1950).

the defendant.[16] In cases of conflict among the various schools of law and the parties to the suit belonging to the different schools as such, the defendant may choose the system of law according to which the case may be judged, and the case would be transferred to the judge of the school of the defendant, but if the other party remains a non muslim, the case was to be governed by the Islamic law and similar remained the case where both the parties were non muslims, with some difference of opinion among the Sunni schools of law.[17]

2 THE CLAIM AND THE PARTIES TO A LAW-SUIT

A claim or *Dawa* is defined in Islam as a demand by a person of his right from another in the presence of a judge.[18] In order to bring an action for a claim the conditions to be fulfilled are, firstly that the thing for which the claim is brought should be specific, and known, secondly, there must be probable and sufficient proof for the claim, thirdly, the party in the action must sue personally, or authorize an agent legally for it, fourthly, the claim must be made before the sued party, fifthly, it must not be contradictory, and sixthty, it must be enforceable against the other party.[19]

The person making the claim is called *Muddai* or plaintiff, and who even voluntarily relinquishes the claim cannot be compelled to prosecute it while the person from whom the demand is made is called *Muddaa-al-aihi* or defendant and who remains compellable to sustain the claim in the case of avoidance, and according to Imam Mohammad

16 Abdur Rahim, 365.

17 Prof. Choucri Cardahi in Law in the Middle East, 340 et sq.; for the West see, Bartholomew, Private Interpersonal Law, 1 Int. & Comp. L. Q. 325 et. sq. (1952).

18 Abdur Rahim, 365, Bahari-Shariat, XIII. 3.

19 Bahari-Shariat, XIII. 4-5; Ham. Hedaya, 399; compare, Odgers, Pleading and Practice, Ch. XI.

he is a person, who denies the claim.[20]

A person possessed of full legal capacity can only bring an action, and a minor, a lunatic can sue only through a proper guardian. A plaintiff must particularly state the subject-matter of his claim, which (if, in movable property) must be produced in the court, and the defendant must appear to answer a valid claim and produce the subject of it.[21] If the subject of the claim be not present, the value of it must be specified to ascertain the subject. If the claim relates to land or other immovable property it is essential that the plaintiff defines the boundaries and say that it is in the possession of the defendant and it is claimed from him. In cases of claim of debts, the plaintiff must describe the species and the amount.[22] As a claim may be brought orally or in writing, it is essential that in the former type the court or the judge ought to record it. All claims must disclose a good cause of action against the defendant, the test of which is, as to whether if the defendant admitted the allegations of the plaintiff, a decree would be passed against him.[23]

3 PLEADINGS AND OTHER PROCEDURE PRIOR TO TRIAL.

Once the claim is filled in the court by the plaintiff, the suit is on its way and the next move is upto the defendant. The judge upon being satisfied on a prima-facie case of the plaintiff, will ask the defendant about the suit, but not so if the suit fails to establish a prima-facie case. If the defendant admitted the claim of the plaintiff alleged in the complaint, the suit stands decreed, but if the defendant denies it, the burden lies upon the plaintiff

20 Abdur Rahim, 365-366; Ham. Hedaya, 399-400; see also the Majalla.

21 Ibid.

22 Ham. Hedaya 400-401.

23 Abdur Rahim, 367; compare O. 2 with rules of the Civil Procedure Code, 1908 (India); Odgers, 146 etsq.

to prove his case by witnesses and if he had no witness, the judge will ask the court to administer oath to the defendant, who if takes an oath, the suit may be dismised but if he refuses to take the oath then the judge will proceed in favour of the plaintiff to decree his case.[24]

When two or more persons have violated or are interested in denying the right of the plaintiff, the law lays down different rules for the selection of the proper parties by way of joinder of parties. For example, in the matter of an estate of a deceased person, the general rule says that one of the heirs may be a plaintiff or defendant with respect to a claim which could have been made by or against the deceased, except a share in a suit for the recovery of a specific property from the estate of the deceased when the proper defendant is the person in whose possession it is and a heir who is not in possession cannot be made defendant.[25] A single member of the general public can bring an action for a property of public benefit.[26] If the plaintiff remains a dumb person, the judge is to proceed with his signs and take oaths and other matters accordingly.

4 THE TRIAL

A claim is to be heard in the presence of the parties or their representatives. If the defendant does not come with the plaintiff in the Court, the Court will issue summons for his attendance, otherwise he will be compelled on his refusal and by appointing a person in his behalf pass an exparte

24 Bahari-Shariat, XIII. 11 citing Hedaya, Durrul-Mukhtar; compare the Oaths Act, 1873 (India); see for Summary Judgement O. XIV, (England); also for the utility and value of Oath see Bentham, Works VI. 308 etsq. (1843).

25 Abdur Rahim, 368; compare O.I. with Rules of the C. P. C. (India); Odgers, 12 etsq.

26 Majalla; compare Ss. 91, 92, O. I. R. 3. C. P. C. (India); O, XVI R. 9, 37 (England).

decree which may be set aside on showing of a proper cause.[27]

If both the parties remain present in the court, the the defendant is asked to answer the stated case of the plaintiff by the nature of avoidance called *Dafa*. [28] If the defendant disputes the claim in his defence, the plaintiff will be called upon to prove his allegations and the court will decide by judging the sufficiency and admissibility of the evidence adduced, otherwise, the judge will proceed with the case and call the defendant to take an oath. In the Islamic law, the testimony of witnesses is the best proof and written testimony has generally been not given preference to oral testimony and from this rule the positions of oaths coupled with other matters have received a sanctity.

The modern practice of representation of cases of the parties through agents called attorneys or advocates was also prevalent in the Islamic law. The particular contract was called the contract of agency or *Wakala*. The agents were called *Wukala* or the *Khusama* or *Khusam*.[29] It ofter. happened that the judge may refuse the permission of representation on the belief of personal true statement of the party, similarly, the judge may forbid personal appearance of a party and order for a Wakil to represent him, as for example a woman "of outstanding voice and beauty" was prohibited to defend her case before the judge.[30]

5 THE JUDGMENT

When the issues and disputes among the parties were

27 Abdur Rahim, 369.

28 Ibid 370; compare O. 8 R. 1, O. 9 R. I. C. P. C; Odgers. 9, 107 etsq.

29 Prof. Tyan in Law in the Middle East, 257-258, compare the Advocates Act. 1961 (India); The Legal Practitioners Act, 1879 (India); Anderson, The International Bar Association, 36 A. B. A J. 463 (1950); Moses, International Legal Practices, 4 Fordh. L. R. 244 (1935).

30 Ibid.

settled or terminated by the judge, it was called a decree or *Hukum*. It may be of several shapes depending upon the the nature of the suit. It became binding upon the parties and their legal representatives and the matter became res judicata or finally settled, unrevivable again on the same point,[31] but a decree against a person in possession declaring that the property was a Wakf, was binding upon all the persons, though there is some difference of opinion among the jurists.[32]

According to the modern researches, the judge while deciding a case must consult legal experts called *Fuqaha*, where he was unable to find a solution for a case. The institution of *Futya* or *Ifta* which consisted of answering legal or religious matters was similar to the Roman institution of the *Insrespondendi*, and resorted to in cases of needs.[33] The judge decided the case upon frequent reviews of similar prior cases and it was to an extent similar to the modern doctrine of judicial precedents.

6 THE REVIEW

The modern common law maxim that, "nothing is settled until it is settled right", was too applicable in the Islamic law, for if the decree of the court was contrary to certain principles of law such as, if it was based upon inadmissible evidence or favoured a particular person, it was void, such cases were to be reviewed again for such principles of law and a rehearing was ordered.[34]

31 Fatwai-Alsmgiri, III 525.

32 Ibid; Abdur Rahim, 372; compare S. 11 C. P. C. (Res Judicata), O. 2 with Rules C. P. C. (Judgment and Decree); For English Law see Odgers, 276 citing Ralli V. Moor Line, 22 Lloyd's List Rep. 530 Decree; see also Millar, Premises of the Judgment as Res Judicata in Continental and Anglo-American Law, 39 Mich. L. R. 1-36, 238-66 (1940).

33 Prof. Tyan, 246-48; compare section 45 of the Indian Evidence Act, 1872; O. XXXVII A (England); For America, see Wigmore, Code of Evidence, Ss. 557, 583, 587 (Ed. 1942).

34 Abdur Rahim, 372; compare O. 46, 47, S. 115 etc. relating to Ref

7 THE ENFORCEMENT OF THE JUDGMENT OR THE ORDER

The simplest judgment to enforce is one for the defendant and the law provided for it through the agency of the court by way of execution or *Tanfid* too. It may take various shapes, for example by imprisoning the judgment-debtor to pay the debt as a way of compulsion, or selling his property to realise the amount and it depended upon the form and nature of a decree, for the rule was firmly established that the executing court cannot go behind the decree.[35]

It was often practised that the court for the preservation of the property in dispute passed interim reliefs similar to the modern procedure of appointment of receivers and the like.[36]

OTHER OFFICIALS

The court officials working for the proper administration of justice remain interesting for a modern comparative law lawyer. There were court clerks, interpreters, and assistants to maintain order in the court and who were called *Awan* or auxiliaries. The person who maintained the full record of the case was called *Katib*, and the *Muzzaki* investigated the character of ordinary witneses. The *Mutarjim* or the interpreter translated the statements of the witnesses or the litigants given in a foreign language. The *Bawwab* or the door-keeper sat at the door of court to maintain order. The *Amin-Al-Hukm* was appointed to safeguard and administer the properties of orphans, while the *Khazin Diwan Al-Hukm* was an official entrusted wit the safe-keeping of the court's archives.[37]

rence, Review and Revision of the C. P. C. (India); Odgers, Ch. XXI.

35 Ibid; compare O. 21 C. P. C.; see also the allied sections relating to execution of decress, orders etc. of the C. P. C. (India) see, for English Law: Odgers, Ch. XXII.

36 Hedaya, VI 430; compare O. L. Rule 16; Odgers, 22, 157, (for English Law).

37 Prof. Tyan, 255 etsq.

THE LAW OF LIMITATION

It is said that under the old classical theory of the Islamic law, a person's right would not be lost by any lapse of time and the judge was bound to hear the claim at any time. But the changing notions of time, to which the Islamic law is not an exception recognized the rule that such claims were not to be heard after fixed periods of limitation.[38] Chapter II of Book of Actions of the Majalla and its Articles 1660, 1661, 1674 provide for the statute of limitation in different types of cases, and it is said that in general, actions may be brought for fifteen years, but thirty-six years were allowed for bringing action relating to a Wakf property, while actions relating to government lands, private roads or water rights may be heard for ten years only.[39]

THE LAW OF COMPROMISE

Islamic law recognizes the right to a contract by means of which a dispute is prevented or set-aside which is called *Sooth* or composition. The essential conditions for it, are declaration and acceptance and the subject of the composition must be a property and be specified.[40] A compromise may be of three kinds. The first is where the defendant aknowledges the right of the plaintiff and then compounds it for some other thing, while the second, is where the defendant neither acknowledges nor denies the claim of the plaintiff and remains silent, and in the third type, the case is compromised after denial by the defendant.[41]

§ 3 The Law of Evidence

In the Common law a proof is generally made by means of production of evidence by the facts, testimony, and documents legally received to prove or disprove the fact under a

38 Abdur Rahim 374 citing Raddul-Muhtar IV. 377-379.

39 Prof. Onar in Law in the Middle East, 305-306; compare the Indian Limitation Act, 1908; The Limitation Act, 1939 (English).

40 Ham, Hedaya, 440.

41 Ibid. 441; compare O. 23 R. 3, O. 24, R. 1, 2, 4, O. 32 R. 6, C. P. C. (India); Odgers, 206, 271 etsq. (for the English Law).

particular inquiry.[42] It may be of two kinds, either oral which are the spoken words of a witness before a judge or documentary upon the tests of relevancy and admissibility.

In the Islamic legal theory, the basic type of evidence is that which is given by the witnesses. It may also be in shapes of documentary and presumptive evidence and oath. The Islamic theory of evidence is based upon the testimony of a witness called *Shahadat*, which is a juristic act of the category of information. The reason of the rule may be said to arise from the fact that give rise to a right of an individual of which the state takes notice when moved by him and when to a right of its own, takes notice of it by own motion, and the judge if himself not possessed of personal knowledge of the occurrence, has to rely upon the information or evidence which may be supplied by some-one who perceived the facts or signs accompanying the event.[43] When such things occur, it is the duty of every person to give an information of it to the state, but if such person did not give a correct and true account, his information remains false and inadmissible in evidence.[44]

There are different kinds of testimony, and the most valuable is oral testimony which is called *Tawatur* or universal testimony. It may consist of informations given by a large number of men appealing to reason as true and correct.[45] The other kind of testimony which is not possessed of such a character and value is called an isolated or single testimony or *Ahad*, but a man's own acceptance

42 Phipson, Evidence (7th. Ed.); for comparative study see, Millar, The Mechanism of Fact Discovery: A Study in Comparative Civil Procedure, 32 Ill. L. R. 261 etsq., 424 etsq. (1937).

43 Abdur Rahim, 374-375; compare Ss. 59-60 of Ch IV of the Indian Evidence Act, 1872.

44 Ibid. citing Fathul-Qadir VI. 446.

45 Ibid. 378; compare Ch. IX and X of the Indian Evidence Act, 1872; The Evidence Act, 1938 (England); Wigmore, Code of Evidence, S. 1304 (for the American View).

of a fact against himself is called admission or *Iqrar*. The law says that it is incumbent upon witnesses to bear testimony and it is not lawful to conceal it because the Quran says that, "Let not witnesses withhold their testimony when it is demanded from them", and also that, "conceal not your testimony, for whoever conceals his testimony is an offender."[46]

Various rules are laid down by the Islamic authorities in relation to the competency and capacity of a witness and the testimony given by him. The law insists upon certain conditions as necessary that the informations given by a witness may be relied by a court. The Fatawai-Alamgiri and the Durrul-Mukhtar put certain conditions for a witness. They say that he must be possessed of understanding, majority, freedom and be physically fit to give evidence, further he must not be an interested party, and must know as to the subject-matter of evidence and must not be a party to the dispute and the evidence which he gives by way of testimony must be in accordance with the complaint of the plaintiff.[47] The witness must be free from bias and prejudice,and of reliable character, and must not be a minor, a lunatic or blind in matters which have to be proved by ocular testimony.[48]

As in the modern systems, the testimony of a single witness is generally regarded as inadequate to support a claim, hence the Islamic law adopted the rule of two witnesses, by prescribing that there must be either two male witnesses or a male and two female witnesses, and if the males are not available, the testimony of females may be accepted. In cases where a public right is violated and where absolute certainty of proof is required, such as

46 Ham. Hedaya, 353; compare Ch. IX and X of the Indian Evidence Act, 1872.

47 Bahari-Shariat, XII. 89.

48 Abdur Rahim, 376-377; compare Wigmore, Code of Evidence, Ss. 201-203, 550-551, 561-1110.

offenses entailing the punishment of hadd or fixed punishment, it can be proved only by the testimony of two male witnesses and in the case of whoredom, the testimony of four males is essential, as a female is of weak character, hence her testimony is of inferior character.[49] In cases of doubts and objections of the opposite party in relation to the testimony of a witness, it is the duty of the judge to investigate the witness privately or in the court from the persons who remain closely acquainted with the life and character of the particular witness.

Though it is the general rule that a hearsay evidence is generally excluded, yet in matters of state administration, paternity, and death, such evidence may be received, so is also the provision of Article 1688 of the Majalla.[50] So also in cases where the person who witnessed a particular transaction is dead or cannot be found, then a hearsay evidence is admissible of a person who had heard about it, and this evidence is called the evidence of testimony or *Shahadut-ala-Shahadut* and is valid accordinlg by juristic equity due to necessity.[51]

Besides human testimony, the Islamic law recognizes circumstantial evidence which is based upon facts and circumstances, and which is called *Qarinat*, but it must be of a conclusive nature or *Qatiatun*.[52] For example, if an individual is seen coming out from an unoccupied house in fear and anxiety with a knife covered with blood in his hand, and in the particular house another man is found murdered with injuries on throat, such facts are to be regarded as a proof that the person coming out from the house has

49 Ibid. 377; compare S. 134 of the Evidence Act, 1872; Wigmore, Ss. 1926, 1950 and the allied provisions.

50 Prof. Onar in Law In the Middle East. 306.

51 Abdur Rahim, 379 citing Hedaya VI. 522-533; compare, Hammelmann, Hearsay Evidence: A comparison, 67 L. Q. R 67 etsq. (1951), Wigmore, S. 1370.

52 Ibid.

murdered the man.[53]

A document in the shape of writing or seal may be validly admitted in evidence, but the necessary condition of their validity is that they must be free from taint of fraud or forgery.[54]

The law regards the evidence of a blind man as inadmissible. But there is a diversity of opinion among the jurists. For example, Ziffer maintains that such an evidence is admissible to matters where a hearsay evidence prevails, because in such cases, a hearing is only required and so in the hearing of a blind man, there is no defect. According to Imam Shafii and Abu Yusuf, such evidence in such matters is lawful provided he was possessed of sight at the time of their occurence. The general trend of the Hanafi school puts the argument that in the delivery of evidence there is a necessity to distinguish between the person for and against whom it is given and a blind man is incapable of doing this otherwise than by his voice, and this is attended with doubt, which may be avoided, by the party producing a witness possessed of sight.[55]

The juristic effect of a testimony may be revoked by the witness himself by retraction of what he testified to, and it may be made in the court itself, and not outside, but if he so retracts the testimony before the court passes an order, such a testimony will be rejected, but if it is made after the order, it will not affect the order and if any loss is done by it, such a witness will be held liable for it.[56]

53 Ibid. citing Al-Majalla, 297; compare Ss. 7, 8, with Illustrations of the Indian Evidence Act, 1872; Wigmore, S. 204-5 Par. (a) Illustration (for close similarity of the Islamic Law with the Anglo-American Law).

54 Ibid 382; Fatwai-Alamgiri III 534; Article 1736 of Majalla; compare Ch. VI. of the Indian Evidence Act, 1872; S. 1 of the Evidence Act, 1938 (England); Wigmore, S. 2085.

55 Ham. Hedaya, 359; compare Wigmore, S. 561 for blindness as disqualifying a witness

56 Abdur Rahim, 382; compare S. 132 of the Indian Evidence Act,

But if three persons give evidence concerning a property, and one of them afterwards retracts his testimony, he is not subjected to any responsibility, because the whole of the right remains established in virtue of the two remaining witnesses.[57]

As in the modern systems an admission or a confession of liability is a proof of responsibility or guilt, similarly in the Islamic law an admission which is unconditional and voluntary is a sufficient proof of the case of the party complaining and becomes binding on the party so admitting, but if the fact admitted is contradicted by apparent and obvious circumstances of the person making the admission, it will not be accepted by the court.[58]

1872; Wigmore, Ss. 820, 915 for the Western rules of general principles of impeachment and self-contradication of a withness.

57 Ham. Hedaya, 373.

58 Abdur Rahim, 382; compare Ss. 17-31 of the Indian Evidence Act, 1872; Wigmore Ss. 780-996, 1077, 1106; for an overall view on evidence, see Wigmore, Looking Behind the Letter of the Law, 4 U. of Chi. L. R. 259 etsq. (1937).

XIV
The Law of Interpretation and Application

§ 1 Preliminary Observation

In a classical remark about the rules of interpretation in the Common law countries Lord Halsbury once said that, "It seems to me that in construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the code so created because before the existence of that code another law prevailed".[1] The reason of the remark of the Lord Chancellor might have been in the sense, that "the statute, itself, is in the form of a general proposition, and all that the judge would seem to have to do is to derive, by deduction from that general proposition of law, a particular rule which will control the decision of a given controversy", for, "the tone of assurance in which many opinions involving the statue law are written appears to give support to a theory that the application of statute involves only simple deductive operations from which the personal judgment of the members can be excluded."[2] The principle of interpretetion is the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey, and of enabling others to derive from them the same idea which their author so intended.[3] A words is not a crystal, transparent and unchanged, it is the skin of a living thought and

1 Bank of England V. Vagliano 1891 A. C. 107, 120.

2 Jones, Statutory Doubts and Legislative Intention, 40 Col. L. R. 957 et sq. (1940).

3 Lieber, Legal and Political Hermeneutics, 11 (3rd. Ed.).

may vary greatly in colour and context according to the circumstances and the time in which it was used [4] Upon this basis, the judgment of the court must rest upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the whole statute would be destroyed, for the doctrine requires a court not to inquire into the motive of legislative body.[5] In the codified Civil law systems of the Continent, the old notion that a Code contains all law is being relaxed and the jurists argue that a judge must interpret it as faithfully as possible by discovering the real meaning of the words in which it is expressed and used.[6]

In the Islamic system the rules of interpretation having more or less the same meaning are considered as a subject of jurisprudence. The jurists hold that the interpretation of a legal text of the Sharia is governed substantially by the same principles as other questions of interpretation, for the function of interpretation is to discover the intention of a person, whether he be a lawgiver, an expounder of the law or any other person, through his words or conduct.[7] The main purpose of interpretation is to ascertain the real intention of the lawgiver or the expounder of the law chiefly with regard to what has been left unexpressed as a matter of necessary inference from the surrounding circumstances or as furnishing an index to their mind.[8]

The foundations of the Sharia of Islam are the Quran, the traditions, Ijma and Qiyas, which have been studied analyzed, commented upon and applied since centuries, and it will be highly objectionable to supplement to the interpretations given upon them by the previous authorites. The

4 Holmes J. in Towne V. Eisner 245 U. S. 418, 425 (1918).
5 Cardozo J. (dissenting), in United Sates V. Constantine 296 U. S. 287 (1936).
6 Paton, 194 refer. Geny.
7 Abdur Rahim, 76-77.
8 Ibid.

danger has been pointed out of taking the ancient texts literally and deducing from them new rules of law, because they seem to modern lawyers to follow logically from ancient texts, however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions.[9] But the fundamental nature of the legal theory must be kept in mind, that it is a theory which has grown and developed with the times, and the textual quotation of the Sharia should be so applied as to suit modern circumstances. It is the function of the judicial authorities while administering the Muslim law to take into account the circumstances of actual life, changes in the people's habits, modes of living, necessity and wants of social life of the time. In so doing they should be aware of the dangers in picking out illustrations wrenched from their context and apply them literally, but they should try and deduce the principle which underlies the illustrations.[10]

§ 2 The Rules of Interpretation

The sources of the Sharia of Islam as said elsewhere are the Quran, the traditions, the Ijma and the Qiyas. The sources of the law have been analyzed and commented upon since centuries. In cases of special circumstances and interpretation various rules have been laid down by the jurists. It is a fudamental principle of the jurisprudence that a text of the Quran cannot be repealed by any other source of the law, with the exception of the Mutazila view which holds it's repeal by the doctrine of Ijma. A Sunna aslo cannot be repealed except by a Quranic text, or another Sunna.

A controversy arises on the question of the Ijma being

9 Baqar Ali Khan V. Anjum Ara Begum 25 All. 255 (1902).
10 Ghulam Mohiuddin V. Hafiz Abdul A. I. R. 1947 All. 127; Ashraf Ali Cassam Ali V. Mohd. Ali Rajab Ali AIR 1947 Bom. 122; Abdur Rahim, 37 et sq.

abrogated by another Ijma. The answer most appealing to the mind in view of the type of Ijma is that an Ijma of the companions of the Prophet cannot be repealed, and similarly the Ijma of preceding ages cannot be repealed by the Ijma of later ages. But some jurists as Fakharul-Islam hold otherwise, but a Qiyas cannot repeal an Ijma.

The next step comes in placing own interpretations upon the Quran, and the traditions. Some modern jurists have expressed a guarded opinion in favour of the discretion of a modern lawyer. Their arguments are based upon the theory that the modern discoveries, along with the simple languages of the traditions show that they were for all time and ages to be utilizable by modern people. The argument is simple that we have to know what the law is and not what it shold be in future, for such disretionary interpretations may lead to the creation of a hotchpotch and the beauty and, logic of the religion will be lost. The modern jurists and judges cannot deduce law by analogy, and similarly they cannot reject a rule deduced by ancient doctors, and similarly the precepts of the Prophet should not be taken literally to deduce new rules of law which would result in great encroachments on justice.[11]

When there is some difference of opinion between

11 Agha Muhammad Jaffar V. Kulsum Bibi 25 Cal. 9 (1897): 24 I.A. 196; see also Baqar Ali V. Anjuman 25 All 236 et. sq. (1902); 30 I. A. 94; Bikani Mia V. Shuk Lal 20 Cal. 116 (1893), note the dissent of Ameer Ali J.; also see Abdul Fata V. Rasamaya 22 Cal. 619 et sq. (1894): 22 I. A. 76; see however Agha Ali Khan V. Altaf Hasan Khan 14 All. 429 (1892). Compare the value and authority of precedents in the Anglo-American Common Law, see Salmond, Chaps. 7, 8 (11th Ed.); Hale, History of the Common Law, 89 (1820); Friedmann, Legal Theory, 431 et sq. (4th. Ed. 1960) for the values in legal development; Goodhart, Precedents in English and Continental Jurisprudence, 50 L. Q. R. 226; Paton, 159 et sq.; Lipstein, The Doctrine of Precedent in Continental Law, 28 Jl. Com. Leg. (Pt. III), 34 (1946); Allen, Law in the Making, Chaps. IV. V. VI. (1958); Patterson, Jurisprudence Ch. XIX. (1953).

Imam Hanifa and his desciples, the first view holds that the opinion of the master ought to be accepted, the second view favours the majority opinion, and the third view holds that Abu Yusuf's opinion must be accepted in judicial matters, except the view of Muhammad in succession of distant kindred as the Fatwa is with him[12] But cases may arise where there remains a conflict between the views of the commentators without any unanimity, the judge has a free choice between the opinions to adopt any which is suitable to the conditions and needs of the time.[13] Interpretations in opposition to the rulings of ancient authorites being illegal, the rule holds that when once a great Muslim jurist has interpreted a particular precept in a particular way, that interpretation should be followed without referring back to the original authorities.[14] But it should be noted that most of the Fatwas or opinions of jurists were delivered in answers to abstract questions intending to illustrate a certain principle of law and it would be misleading to treat such opinions as absolute rules of law having the same authority as a text of the Quran or accepted by the traditions or by Ijma.[15]

The jurisprudence of Islam is not a static system, but it changes with the changing times, as it has been said, that, "now there is no doubt that ancient Muslim texts must be considered with utmost respect. But it must also be remembered at the same time that the quotations from the Muslim texts should be so applied as to suit modern circumstances and conditions. It is also dangerous to pick out

12 Ebrahim Ali Bhai V. Bai Asi AIR 1934 Bom. 21; Anis Begum V. Mohd. Istafa Wali Khan 55 All. 743; Abdul Qadir V. Salima 8 All. 149 (F. B.); Kotambiyakath Pathu Kulli V. Nedungadi Bank Ltd. Calicut AIR 1937 Mad. 731.

13 Anis Begum V. Mohd. Istafa Wali Khan AIR 1933 All. 634.

14 Imdad Ali V Ahmad Ali AIR 1925 Oudh 518; Abdul Fata Mohd. Ishaq V. Rasamaya 22 Cal. 619 (1894).

15 Manadi Abdul Rehman Sahib V. Hossain Sahib 12 MLT. 305.

illustrations wrenched from their context and apply them literally. Illustrations merely illustrate a principle and what the courts should try is to deduce the principle which underlies the illustrations."[16] However, the courts in administering the rules of Sharia can take into account the circumstances of actual life, changes in people's habits, modes of living and the necessity and wants of social life of the time, and also the rules of equity.[17]

§ 3 The Application of Law

The Islamic law is an ideal system designed by God for the Muslims, and it is similar to the natural law which is regarded as a legal order of the general maxims of right and justice. Just as natural law exists in nature, the Sharia is the Islamic law of nature revealed to the Prophet Muhammad. The law as later developed by the jurists and theologians through uses of traditions of the Prophet, Ijma and Qiyas was developd into an elaborate science. The whole source of the law is God who is alone the fountain of right and justice. The divine law being infallible, includes dogmas with social and political rules, for the notion of law has the character of religious obligations with political sanctions of religion.[18] This sacred law, being primarily a Code of individual duty, will not be judged fairly with a mere comparison of its commands and prohibitions with the western codes of purely positive or forensic law. For example, the Sharia's provisions on contractual and property relations are full of good points, for they encourage agricultural enterprise on the principle that, "whosoever cultiva es waste lands does thereby

16 Per Chagla J. in Ashrafalli Cassamalli V Mahomedalli Rajaballi 48 Bom. L. R. (1945).

17 Ghulam Mohiuddin V. Hafiz Abdul AIR 1947 All. 127; Hamira Bibi V. Zubaida Bibi 43 I. A. 294 (1915); see also Ham. Hedaya 334; Aziz Bano V. Muhammad Ibrahim 47 All. 823 (1925) for Shia views on interpretation.

18 See Prof. Khadduri in Law In the Middle East, 351-52.

acquire property of them".[19] Its spirit is much concessional to commerce, though it prohibited the usury, yet upon a balanced view the prohibition is justified in the interest of the poor and equality notions of a democratic society. The status it gave to women, the mathematical formulas of inheritance, with care for the poor through the institutions of Wakf, gift and will, are rules, even unchanged since centuries still remain applicable to the foresights of the Lawgiver and commentators of the law, along with 'highly mechanized nature' of the legal theory itself.[20]

The Sharia takes a personal view of the law in its application to the community. It does not take effect from the constitution of a particular political society. The reason of it is that the authority of Sharia is based upon men's conscience instead of political force. As for example, if a muslim goes from one state to another, the law does not cease to apply, and his going into a non-muslim state binds his conscience with rules of the Muslim law, and even impious acts and unorthodox beliefs do not turn a muslim into a non-muslim.[21]

The rules of the Sharia are dominant in North Africa, Western Asia to Pamirs, in the eastern side through Central Asia into China proper to Pakistan. In India the Muslim law is left untouched in personal matters; [22] in Malaya and Indo-China, Indonesia, it is vigorous. In the southern portions of Africa as Zanzibar, Tanganyika, Nigeria and Ghana and in other states nearby, it is applied.

19 Ham. Hedaya 610; Wilson, 49.

20 See Aghnides, Mohammadan Theories of Finance, 149.

21 Abdur Rahim, 59; see also Abraham V. Abrahim 9 Moo. I. A. 199 (1893); Mohd. Ali, The Religion of Islam 126; Abdool Razak V. Aga Mahomed 21 I. A. 56 (1894); Kifayah II. 763; Ameer Ali II. 148.

22 See the Shariat Application Act, 1937; see other text-books for details.

In Europe, Islam is prevalent in the Balkan countries, and southern portions of Russia and is more or less represented in both of Americas. Its followers if roughly counted make about a seventh of the total world population. [23] The right of administration of the Sharia with the general affairs belongs to the community itself. In early days, the Imam or the Caliph was the chosen medium of the head of the state, but he was not possessed of any legislative power but was bound by the laws of God along with others. The modern democratic notions of the West have out-dated the notions of the governance of the state by the chosen medium, and since the abolition of the Caliphate independant states have arisen who have copied the Western systems of administration in a peculiar shape with retentions of the Sharia principles chiefly in relations to the rules of conduct of the people.

The rules of the Sharia of Islam in cases of conflicts with laws of non-muslim communities in an Islamic country in civil and criminal disputs, remain dominating as the Sharia has to be applied.[24] The basis of the principle may be attributed to the Quran, which considers that Islam must dominate and cannot be dominated.[25] Yet the Islamic rules are concessional and wide to non-muslims, for it is an acccepted fact that it is the pleasure of God that such men, "should be allowed to live their own lives on this earth as they please, provided they are not hostile to the law, and are willing to submit to its authority in so far as it is necessary for its upholding", hence, if, "a non-

23 See Gibb, 25-26; For selected bibliographical studies cf the works of the Islamic legal institutions in English, see Stern, Mohammedan Law in the English Language, 43 L. Lib. J 16-21 (1950), and for materials of the Middle East legal institutions, see Liebesny, Literature on the Law of the Middle East, 3 Middle East. J. 461-69 (1949).

24 See Prof. Chourci Cardahi in Law In the Middle East, 337 et. sq.

25 See the Quran IV. 140, V. 54-55; Prof. Cardahi, 337 citing Santillana, op. cit 84 ff.

muslim lives under the protection of a Muslim state, the secular portion of the legal code would apply to him, that is, generally speaking, so much of it as is in substance common to all nations, and not such rules as are specially indentified with the tenets of Islam. For instance, "a non-muslim drinking alcohol is not subjected to punishment and his transactions in wine and pigs are valid."[26] The basis of it is in the fact that the application of the Islamic Sharia is entirely territorial in character in relation to non-muslims, as it does not apply to those among them who do not live within the jurisdiction of the Islamic state.[27]

The area of the Sharia is wide enough to deal every circumstance and condition that may arise in daily life of a country. It also took wide view in relations to public and private international law principles. If conflicts arose between non-muslims belonging to different religions, the law provides the muslim judge to apply his own law, since a non-muslim could sue his co-religionist in his own religious court.[28] The rule may be said to be a reaction of the old jurists of the Sharia to the policies adopted by the West and East as says Ameer Ali that, "owing to the state of belligerency which existed originally between the Islamic Common-Wealth and the hostile nations of the East and the West, the early Moslem jurists like the Christian jurists of the later times (as Grotius and Puffendorf who expressly excluded the Musulmans from all community of interest with the Christian nations of Europe; and even later international jurists countenance the view that international law is limited to Christendom), divided the civilised world into two great parts, the *Darul-harb* and the *Darul-Islam*,—the territories of war and the territories of peace. These two

26 Abdur Rahim, 59.

27 Ibid.

28 Prof. Cardahi, 340.

divisions, one of which represented the land of infidelity and darkness, the other that of light and faith, were supposed to be always inimically inclined towards each other. But the Mahommedan Law allowed ampler guarantees of personal safety to non-Moslems who entered the territorial limits of Islam for purposes of trade or commerce, than were recognized in Christendom. A non Moslem entering a Moslem country was regarded as a guest, even if the *Aman* or guarantee which he received on the frontier was granted to him by an ordinary villager .. .. In process of time, however, new relations sprang up between Moslem nations and various non-Moslem countries; a state of amity limited either to fixed periods or in permanence was established in such cases, under which by mutual agreement, Moslems and non-Moslems acquired reciprocal rights in the friendly states .... ".[29] During the twentieth century, however many old barriers have ceased to obstruct the mutual intercourse and understanding, for as said justice Jackson of the American Supreme Court that, "Both Christendom and Islam are stirred with a new yearning and unrest. Today the anxious countries of the West find in the Islamic world some of their most bold and uncompromising allies in resisting the drive for world supremacy by those whose Prophet is Marx. We have become more objective about history and more tolerant about religious differences. Trade with the Middle East adds the elements of expediency to other motives for study of its laws and institutions."[30]

As regards the conflict of laws the rule remains, that,

29 Ameer Ali II. 149-50 citing Woolsey, International Law, S. 5; for a thought provoking recent discussion On Capitulations and, the development of Western Judicial Privileges, see Liebesny in Law in the Middle East, Ch. XIII.

30 See Foreword to the 'Law in the Middle East' Ed. Khadduri and Liebesny (1955); see also the hope for a more understanding thought upon the Christian Muslim Conference (Bhamdun, 1954) by W. C. Smith in Islam in Modern History, 111 (1959).

when both the parties to a dispute are muslim, the Sharia applied to both of them. But the case may become different when the parties belong to different sects and schools in the Sharia itself and it takes the shape of a problem in such cases. In matters of succession, the Muslim jurists are agreed that in cases of disputes between the heirs of a deceased person, the law of the school of the deceased applies irrespective of the, sect of the parties.[31] In other matters, the jurists differ. However in India, in such cases, the Sharia provides that, firstly, it may be decided according to the law of the defendant, secondly, according to the law of the plaintiff, and thirdly, according to the rule of equity, justice and good conscience, depending upon the circumstances of each case.[32] If the disputing parties belong to the Sunni sect, but of different schools, the Sharia provides that in cases of hardship, the judge of one school of of thought, as for example, a judge of the Hanafi school may send the case to a judge belonging to the other school of the Sunni law.[33] The Sharia provisions have been more liberal in modern application in the Islamic countries The defendant is usually given an option to choose the school according to which his case is to be decided. In Tunisia, the Shaykhul-Islam provides that, "If the plaintiff has sued in the court of the judge of one school, and if the defendant, before any statement has been made before the judge, asks for the transfer of the case to a judge of a different school, such a request cannot be refused."[34] It is said that this right of choice by the defen-

31 See Hayatun-Nissa V. Muhammad Ali 12 All. 290 (1890)

32 See Mandy Mathar Sahib V. Binjan Bi AIR 1930 Mad. 234; Aiz Bano V. Mohd. Ibrahim AIR 1952 All. 720; Bussun Marwary V. Kamaluddin Ahmad 11 Cal. 421 (1885); Sitaram Bhaurao Deshmukh V. Sirajul Khan 41 Bom. 636 (1917).

33 Fatwai- Hindi X. 22.

34 Prof- Cardahi in Law In the Middle East, 341 citing Morand, "Le

dant is not an obligation but is a submission to the judge of the plaintiff which is permitted under the Islamic law, for a similar provision is also provided in Egypt, where in the absence of a Shafii judge, the people of that sect have always without any objection accepted the jurisdiction of Hanafi judges.[35]

Upon a change by the followers of Islam to another religion, the Sharia as in other religions provided strict penalty to such people. [36] In civil matters, if a non-muslim couple convert themselves to Islam, their marriage remains valid and the Islamic law was applied, and similar was the case of the husband embracing Islam and the wife remaining a *Kitabia* or a Christian or a Jewess. If the wife remains a non-Kitabia she was given an option of time for embracing Islam, otherwise the marriage stood dissolved. As regards inheritance, the Quran provided that a non-believer cannot inherit from his Muslim relative. [37] In the field of criminal law, the law applied was the one which governed the offender at the time of the commission of the offence [38] In India, the Islamic provisions have been amended and codified, yet upon a review of the whole situation, it is submitted that the interests of the parties have to be balanced in the light of modern changing notions of the law.[39]

droit musulman et le conflict de lois, "Acta academiae universalis jurisprudentia comparative" I. 321 ff.; see also Article 1803 of the Majalla.

35 Prof. Cardahi 342 citing A. Girault, Principesde legislation IV. 357; Morand 335; Fatawai-Hindi II. 359.

36 Ameer Ali II. 388; Fatawi-Alamgiri II. 357; Baillie II. 29.

37 Quran, IV. 140.

38 Prof. Cardahi in Law In the Middle East, 344.

39 See Qadri, 89 et. sq ; see also Heffening, S. V. 'Murtadd' in Encycl. of Islam III. 736 et. sq.; Rakeya Bibi V. Anil Kumar Mukherji 2 Cal. 119 (1948); Fyzee, 153 et. sq.

XV

Islamic Law and the Modern World*

§ 1 The General Theory of Social Change

The fundamental problem faced by social philosophy is that of the relation between law and society, or in other words, the relation of 'Law to Life'. It is nothing than a bias in favour of law or in favour of society;[1] for it has been said that, "Law and the law official are not therefore in any real sense what makes order in society. For them society is given and order is given because society is given..... The 'Law then is the interference of officials in dispute, appears as the means of dealing with disputes which do not otherwise get settled."[2] The basis behind law and society, may be attributed in the life of the law itself, with a major emphasis upon its stages of social function. Coke said in the 17th century, that, ".....reason is the life of the law, nay the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason."[3] Later in the 19th century Holmes modified the view of Coke and said that, "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, have had a good deal more to do than the syllogism in determining the rules by which men should be

1 Fuller, American Legal Realism, 82 U. Pa. L. R. 29(1934).

2 Ibid. citing Prof. Karl Llewellyn.

3 On Littleton (1628), 97 b.

*Through this chapter, the author initiated the Symposium on "Receptions of Western notions of Law In Sharia," held in the Faculty of Law, the Aligarh Muslim University, on Nov. 24-1962 in connection with the visit of Prof. J. N. D. Anderson, O. B. E., LL. D., of the University of London.

governed. The law embodies a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics....."[4].

In 1940, Pound gave a new turn to the definition and purpose of the law, for he said, that, "Law is neither wholly reason nor wholly experience. It is experience developed by reason, and reason checked and directed by experience."[5] He illustrated of what he said by showing that," The strongest single influence both in determining single decisions and guiding a course of decision is a taught tradition of logically interdependant precepts and of referring of cases to principles."[6] He summarized the perpetual antinomies of the tension between law and life by saying that, "Law must be stable, as yet, it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change."[7]

A question may be asked to illustrate the method of social change by the legal theory, the answer has been well illustrative in the issue involved in the legal theory itself, in daily life in society along with it. Firstly, in everyday life, there is no escape for the law from the struggles of life, secondly, a legal technique is always subordinate to social ideals, thirdly, the study and the practice of the law provides one avenue to a diagnosis of social crisis, no less so than any other social science, and fourthly, the respective shares of legislator and practical lawyer in the evolution of society through law are, however, determined both by the political

4 The Common Law, Ch. I. 1 (1881).

5 The Economic Interpretation and the Law of Torts, 53 H. L. R. 365 (1940).

6 Ibid.

7 Interpretation of Legal History, 1 (1923); see also his recent views in Jurisprudence (1959).

structure of society and by the extent to which the legislative machinery can satisfy the need for social change.[8]

In the United States the 19th century social change was upon the policies based upon the significance of political-constitutional frame-work which related to the division between private and public decision-making in legal institutions creating and protecting the frame-work for private economics in eradication of mercantilist legal policy, legal protection of the market and facilitation of capital accumulation, in promoting economic development by law, with social costs of economic development. In the 20th century, it was turned into a legal intervention to curb the exercise of private economic power through the provisions of the anti-trust laws, the public utility-type regulation, by developing organization of private countervailing power by the formations of farmer's associations, chained stores, trade Unions. It further enlarged the scope of public decision-making, in order to guarantee every individual the rights of citizenship, to protect the individual as a consumer and status-holder, to develop and conserve the natural resources, to maintain full employment with the emphasis upon the concept of 'public interest.'[9]

In England, the law and the public opinion of the 19th century took the shapes of currents which were firstly, in the period of old toryism or legislative quiescence, secondly, through the Benthamite individualism, and, thirdly, through collectivism.[10] This laid the need for various law reforms and other related problems and their solutions in the law and society, which ultimately resulted in the passages of many statutory enactments for the development of the social progress of the country. The recent development

8 Friedmann, Legal Theory, 447-448.

9 See Aurebach, Law and Social Change in the United States 6 U. C. L. R. 516-532 (1959).

10 Ref. Dicey, Law and Public Opinion In England in the 19th Century (1926).

in the 20th century of England show that the judicial and administrative authorities, "vacillate between a desire to take an active share in social evolution through an elastic interpretation of precedents, a socially conscious and helpful interpretation of statutes or the use of general principles of equity and public policy, and a tendency to judicial aloofness from social reform, as a reaction to increased legislative activity ....A period of steady expansion of tort liability indicated a conscious judicial endeavour to translate new social postulates into law," for "the expansion of liability," for example, "under Rylands V. Fletcher, ... and other judicial developments showed a practical awarness of new principles of public policy."[11]

In the Civil law countries of the Continent, while the moral, political and social spirit of the early parts of the 19th century was based upon the Code Napoleon, the social changes of the 20th century are generally found in the growth of public law relations, specifically, in the fields of labour law, taxation, administrative law and laws relating to public corporations.[12] In India, during the Colonialist rule, and since the advent of the British regime to the year 1947, the British legal institutions were introduced for the British interests, which received the involuntary reception of the English Common Law principles, yet since the Declaration of Independence in 1947, the country is creating a new legal order by preserving the essential nature and characteristic of the Common law procedure and method of legal development. The country is keenly interested in the social changes of time by introducing social legislations for the public welfare and interests of the people. Various social legislative enactments, mainly in relation to fields of customary law of the personal relations,

11 Friedmann, Legal Theory, 448; Law and Social Change in Contemporary Britain (1951); Law in a Changing Society (1959); Salmond, Chps. 7, 8 (11th. Ed.).

12 Schlesinger, 323-24.

land tenures systems, and other industrial and labour relations have been passed which generally reflects the Western features of the legal order.[13] Similar is the case of Pakistan. where the Islamic and the Common law principles have been amalgamated, and so also remain the cases of the partial retentions of the Western legal institutions by the newly independant countries of the Orient.[14]

The Western impact upon the general civilization of the East is notable in every sphere of life. From literary to educational origins, and to the commercial life, the West is impregnating the ideas of the East. In the constitutional and governmental set-ups of societies and states, with political and military relations, transport, communication, health, commerce, industry and agriculture, along with their scientific techniques, the West has a firm hold upon the world of the East today, than it was in the 19th century or earlier. Further, the impact of legal values of the modern democracies which originated in the European Rennaisence, Reformatin and in the intelledtual revolutions have been received with great satisfactions and gratitudes by the Eastern civilizations. The legal values of human rights, relating to the legal rights of the individual, the equality before the law, the control of government by the people and the rule of law, have been adopted and continue as such by the East. The Dark Africa, which was in the near past, a place of fear and magic of the taboo has largely received freedom from the Colonialist rules, but is trying to adopt

13 See Gledhill, The Republic of India (1951); Influence of Common Law and Equity on Hindu Law since 1800, 3 Int. & Comp. L. Q. 576 (1954); Alexandrowicz, Constitutional Development In India (1957); Setalwad, The Common Law In India (1961); note the speeches delivered at the Third All-India Law Conference in New Delhi on Aug. 12-14 (1962); Schlesinger, 8, 191.

14 See McWhinney, Judicial Review in English Speaking World, 141 etsq. (1956); Schlesinger, 192; The Rule of Law in Oriental Countries, 6 Am. J. Comp. L. 520 (1957).

the Colonialist's social and legal institutions with least hesitations and doubts.

In the communist Countries, under the domination of the Soviet Russia, there have been radical changes in the direction indicated by the Soviet model, and though some of them still maintain the principles of the Civil law system, the Soviet element has reduced them to vanishing point.[15] In the Soviet jurisprudence, it has been said, "an institution of private law implying the total power of doing with the thing what one likes, it has in fact become an institution of public law (Power of Command), and its main functions are exercised by complimentary legal institutions, developed from the law of obligation."[16] With the transfer of the means of production into the hands of the state, economic planning by the state had absorbed the most important function of the law, as for example, by the decree of 1931, the legal institutions of Commerce have been provided to be guided by the laws and dispositions of the Ceneral and local organs of the state power, and also by the general principles of the economic policy of the U.S.S.R.[17] It is submitted that though the realizations and enforcements of the legal values of the human rights are absent, yet, the Communist countries are also under the impacts of the Western effects, in copying down the Western materialistic and scientific progress, though not at presant but in the past times in building and reshaping up the present. However, as shown by the general statistics, it is established beyond any doubt and hesitation, that the people of the countries living under the Western Common law or the Civil law systems,

15 See Peselj, Legal Trends in 'People' Democracies: The Satellite States, 22 Geo. W. L. R. 513 (1954); Grzbowski, Continuity of Law in Eastern Europe, 6 Am. J. Comp. L. 44 (1957).

16 cf. Friedmann, Legal Theory, 254-55.

17 Ibid.; see also Hazard, Soviet Legal Philosophy (1951); Trends of Law in U. S. S. R., 1947 Wis. L.R. 223-43; Schlesinger, Soviet Legal Theory (1950).

are in majority, and, it is submitted, upon such a review that the majority of the world population is living under the Free World, under their legal institutions best suited for them, according to the changing notions of the time, more or less in varied degrees.

§ 2 The Impact of the West upon the Islamic Law and its Institutions

Having gone into a brief discussion of the general comparative theory of the social charge in law and society, and its generalized influence originating from the West upon the countries of the East it remains easy to analyze such an impact coupled with its degrees of success upon the Islamic principles. It is said that Islam is a way of life and its institutions are a mixture of social, religious and political values of life, being regulated by the Divine Power or God. Being a way of life, its institutions take shapes in order to mould and to be better fitted for the changing society and upon this principle, various movements originated in it leading to interesting results and effects. So, it will be better to give a brief hint upon such movements, in order to tread upon the main phases of the Islamic legal institutions in the modern world.

It is a consensus that the first movement which called for an original purity of Islam was introduced by the Wahhabiya movement It originating in Arabia, soon took roots in other parts of the Eastern hemisphere. It was simple and insisted solely upon the classical law for the obeyance of God along with the traditions of the Prophet. The founder of the movement was one Abdal-Wahhab (1703-1787 A. D.), who condemned saint-worship and attacked the Sharia schools of law, though, it is submitted that the movement was itself based upon the doctrine of the Hanbali school of the Sharia.[18] The followers of the

18 See Smith, Islam In Modern History, 48 (1959); Gibb, Mohammedanism, 128, Modern Trends In Islam (1947)

movement are called Wahhabis or Ahl-Hadith, who place their own interpretations on the Quran and the traditions of the Prophet, and hold no necessity to follow any of Imams of the Sharia schools, and hence for these reasons they are called also as Gher Muqallids or the people who do not follow any school.

As a reaction to the Wahhabiya movement, various Sufistic movements took shapes to mould the Sharia on the puritan and Sufistic principles. These movements more or less differing from each other were originated in Persia, Turkey, India and other places. Jalal-ad-Din-ar-Rumi on the side of Persia and Turkey, and Shah Waliyullah of Delhi (1703-1762) in India are worthy to be mentioned. The Delhi movement was of the shape of an extreme Sufi view, for by accepting doctrines of all the Sharia schools, it emphasized along with Maulana Sayyid Ahmad Barelvi, for a revival of sovereignty in India.[19] The ideals and works of Maulana Rumi possessed forms of muslim intellectual puritanism with the religious and ethical teachings of the Quran and the Sharia principles. The Sufi movement was re-vitlized towards the North-Western portions of Africa by Ahmad-al Tijani, who was the founder of the of the Tijaniyas order.

As the major purposes of the movements were mainly for internal reform and external defence in Islamic thoughts, so an important movement of the 19th century was led by Jamal-ud-Din Afghani (1839-97 A. D.). He became famous in Persia, the Arab world and Turkey, the European-west, and India. He preached reconciliations with the Shia schools, and, wanted to unite in it an European familiarity with the modern thought.[20] He was the inspirer

19 See M. D. Rahbar, Shahwali-ullah and Ijtihad, The Muslim World (1955); Smith, 52; for lucid explanations and discussions of the Sufistic doctrine see Arberry, Reasons and Revelations in Islam (1957).

20 Smith, 54.

and founder of the Pan-Islamic movement. His desciples were numerous, and one of them was Mohammed Abduh (1849-1905), who wanted to separate the political from the religious elements in the Islamic thoughts, in order to restate the Sharia doctrine. He may be called a modernist in the sense, that he wanted to re-evaluate the Sharia in the light of modern changes adopted by the West.

It is interesting to know that the later developments of movements and thoughts in Islam were made vigorous and wide-spread. They were made specifically in Libya, Sudan, Persia, Indonesia and India. These thoughts took liberal views along with nationalistic ideas in Islamic thoughts. In India, for examples, the reforms preached by Sir Syyid Ahmad Khan of Aligarh, originated the intellectual modern progress of the Muslim Community of India. Sir Syyid was a great writer, administrator, and was possessed of unique qualities, for the best example of his is furnished by the foundation of the Aligarh Muslim University.[21] Other important developments were led by Maulana Shibli, Hali, Ameer Ali, Mohd. Iqbal, Maulana Abul Kalam Azad and Mohd. Ali Jinnah in India. In Iran, Taha Hussain, Sangulaji were important persons, and in Turkey, Shinasi, Namik Kemal, Abdul-hak Hamid and Mustafa Kamal led new movements. Haji Angus Salim and others were in Indonesia, and it is submitted that these persons left lasting influence upon later Islamic culture.[22] The Babist, Bahai and the Qadiani sects led movements too, but they were branded heretics, for they preached ideas aloof from the Sharia principles of Islam. Though the complete separation of

21 See Hayate-Jawed by Nawab Sadar Yar Jang Moulvi Mohd. Habeebur Rehman Khan Sherwani; Letters of Sir Syyid. Ed. by Syyid Ras Masud (Badaun); Tahzibul-Ikhlaq-Essays of Sir Syyid; Tafsir-i-Sir Syyid; Report of All-India Muslim Educational Conference (1887), Publications by the Institute Gazette Aligarh.

22 See Smith, 62 etsq.

Church from the state as seen in the Turkish Revolution of 1924 is something unique in the Islamic history, yet, still Islam was made as the state religion there. Though Turkey adopted the Central-European Codes instead of the Sharia rules, yet, there seems to be an Islamic revival in recent times. The recent movement of Jamat-i-Islami led by Moulana Maududi has also gained grounds in some countries with its puritan re-evaluation of the Sharia and institutions of the Islamic thoughts, yet, what will be its future, remains unpredictable at present.

In the fields of political and constitutional relations, some of the modern developments in the West, ignited the Islamic philosophy for their receptions. From Morocco to Afghanistan, from Pakistan to Indonesia, developments of notions of democratic forms of governments have come into at least in existence. With few exceptions of Sheikhdoms and Imam-protectorates, the Western notions and ideas of governments have taken place by replacements of the typical Sharia forms of state headships. The disintegretion of the Ottoman power, coupled with the abolition of the caliphate in Turkey, had laid foundations of the Western systems of government and politics though more or less in absolute shapes.

The impact of the Western ideas in the Islamic culture seems to be rendered into the general lives of the people. Muslims have adopted and continue to do so, the Western educational and industrial systems and ideas of thought with their own thoughts. Islam never forbade that which was progressive, and there was never an impediment to adapt any mode of life, provided it was not prohibited by the religion. As regards the pursuits of learning and education, the tradition of the Prophet permitted and even directed every Muslim, to, "Seek knowledge even into China", and further, it had been said that, "the ink of the

scholar is more sacred than the blood of the martyr". Even some argue further and submit that in taking over the modern learning and educational progress of the West, they are only continuing the heritage of the Islamic civilization itself, and the reader will himself, it is submitted, may form an idea about it after going through the pages of the present book.[23] Even one writer going further declared that, " all progress in learning, culture, and civilization from the seventh century to the present times owes itself directly or indirectly to the mind of the Founder of Islam", and similarly, Iqbal declared, that, "Believe me, Europe today is the greatest hindrance in the way of man's ethical achievement. The Muslim, on the other hand, is in possession of these ultimate ideas on the basis of a revelation, which, speaking from the inmost depths of life, internalizes its own apparent externality. With him the spiritual basis of life is a matter of conviction for which even the best enlightened man among us can easily lay down his life; and in view of the basic idea of Islam that there can be no further revelation binding on man, we ought to be spiritually one of the most emanicipated people on earth .....Let the Muslim today appreciate his position, reconstruct his social life in the light of the ultimate principle and evolve, out of the hitherto partial revealed purpose of Islam, that spiritual democracy which is the ultimate aim of Islam".[24]

The trend in the general developments of the Islamic thoughts give a lucid view of the legal receptions of the Western legal institutions. In recent years, as shown in the previous chapters of the present book, the Islamic

23 See Iqbal, The Reconstruction of Religious Thoughts In Islam (1934); see also Rahimuddin Kemal, The Concept of Constitutional Law In Islam (1955); Mahmassani, Timur, Khadduri & Parwez, The Principle of Law-making in Islam (1961).

24 Cited by Arberry in the Mystries of Selflessness (Poem of Iqbal). Transl. Preface.

countries have passed laws which relate to the major fields of civil legislations in relation to marriage, divorce, and various other branches of the Islamic Jurisprudence. For example, polygamy has been restricted, divorce practices modified, rules of wakf have been amended, laws of inheritance have been liberalized, along with modifications introduced in other related topics.[25]

In Turkey, Kamal Ataturk laying aside the traditional principles of the Sharia, adopted the codes of the European West. In the quasi-Islamic countries, such as, Lebanon and others, the Western legal institutions have been received in more complete shapes. In Afganistan, the Islamic traditions have been modified in part at least by condified systems and statutes. Tunisia, in addition to provisions of matrimonial relations, has liberalized the provisions of the Sharia by investing the Western doctrines of equality of women in matters of inheritance and succession.[26] In Yemen and Saudi Arabia, the law is still applied with its original purity being based on the Quran and other Sharia provisons, but in Aden the change has been proposed to be introduced.[27]

The positions of the Egyptian, Syrian and Iraqi Codes are unique in the field of legal receptions. They reflect the Western influence and want to mix the Islamic Sharia

25 See generally Anderson, Islamic Law In the Modern World (1959); Islamic Law In Africa (1954); the Syrian Law of Personal Status, VII. I & Comp. L. Q. (1955-8), Reforms in Family Law in Morocco, II J of African Law, 3 (1958), Recent Development in Sharia, 40, 41, 42, the Muslim World (1950 to 1952); the Pakistan Family Ordinance, 1961 and other authorities cited supra.

26 See Ibid.

27 See Hart, Application of Hambalite & Decree Law to Foreigners in Saudi Arabia, 22 Geo. W. L R. 165 (1953); Kmox-Mawer, Islamic Domestic Law in the Colony of Aden, 6 I. & Comp. L. Q. 511 (1955).

with the Western legal institutions.[28] The Code of Egypt of 1949, which became operative after the abolition of the Mixed Courts, with the prior abolitions of Codes of 1857 and 1883, which followed largely the Code Napoleon of France, has adopted the French system largely with the Islamic system.[29] The Libyan Code of 1954 has also copied the provisions in Egypt and similar is the case of the Syrian Code of 1949 to be followed on the Egyptian patterns specifically in laws relating to wakfs or endowments.[30]

In the field of nature and characteristic principles of these Codes, it may be noted that they are modern in style and organization, by reflecting with a mixture of the traditional Sharia views specially in family and inheritance problems, but they preserve the jurisdictions of the religious courts in such matters.[31] The Libyan Code only reflects a provision by which the secular courts have absorbed the former jurisdiction of the religious courts.[32]

The West has got a firm grip in the areas of laws relating to obligations, commerce and business relations. Such provisions are largely separate Civilian style business Codes, having a predominance of the Western provisions.

28 See Symposium on Muslim Law, 22 Geo. W. L. R. 1, 127 (1953); Schlesinger, 194 etsq.

29 See Brinton, The Mixed Courts of Egypt (1930); The Closure of the Mixed Courts of Egypt, 44 Am. J. I. L. 303 (1950).

30 See Gamal Moursi Badr, The New Egyptian Civil Code and the Unification of the Laws of the Arab Countries, 30 Tulane L. R. 299 (1956).

31 See Liebesny, Religious Law and Westernization in the Moslem Near East, 2 Am. J. of Comp. L. 492 (1953); Mogannam, The Practical Application of the Law in Certain Arab States, 22 Geo. W. L. R. 142 (1953); Schlesinger, 194.

32 See Qasem, A Judl. Experiment in Libya: Unification of Civil and Shariat Courts, 3 I. & Comp. L. Q 134 (1954); Schlesinger, 194-195; for Iran, see Farman-farma, Constitutional Law of Iran, 3 Am. J. Comp. L. 241 (1954); for South Africa, see Roos, Mohd. Law in South Africa, 24 South African Law Journals, 176-186 (19 7).

The legislations of such Codes have been selective in providing such provisions of commerce and business, with a major emphasis upon the provisions copied from the West. The best illustration of such a mixture of the Sharia and the Western systems is found in the Iraqi Civil Code of 1951-1953. It shows as a way of illustration, the position taken in the major Middle East countries and it is better to quote as cited by Schlesinger, Section 1 of the Article 1 of the Code which provides that, "The Code will govern all questions of law which come within the letter or spirit of any of its provisions." Section 2 says that, "If the Code does not furnish an applicable provision the court shall decide in accordance with customary law and failing that, in accordance with those principles of Muslim Law (Sharia) which are most in keeping with the provisions of this Code, without being bound by any particular schools of jurisprudance, and failing that, in accordance, with principles of equity." Section 3 provides that, "In all of this, the court shall be guided by judicial decisions and by the principles of jurisprudence in Iraq and in foreign countries whose laws are similar to those of Iraq", (meaning the Codes and judicial decisions of Syria, Egypt and France can be applied).[33]

In Indonesia, the Sharia has influences in the country's legal institutions, and though the Dutch who belong to the Civilian system introduced a dualist system, the majority is governed by the customary or Adat law while the others are governed by Dutch Codes. The Netherland East Indies Islands were largely similar to Holland's system of 1838 which was in its turn derived from the Code Napoleon. The Indonesian kingdom of Islands upon becoming independent from the Colonial rule has adopted the unitary system of courts, but it is largely predicted that the

33 Schlesinger, 195; Jawaideh, The New Civil Code of Iraq, 22 Geo. W. L. R. 176 (1953).

dualism of the substantive law will be preserved thereto.[34] However, in Indonesia, the religious courts, exercised jurisdiction over the muslim population in matters of family relations, along with other procedural safeguards.[35]

The Indonesian dualist system is also prevalent in the African territories. The Western Colonialistic systems either of the English Common law or of the other European Civil law countries have influence in such territories, and in those places where the Western influence is not in existence, as for example, in Tanganayika, Uganda, Nyasaland, Nigeria, Gambia, Gold Coast and Kenya, the law is generally indigenous tribal which is either of the primitive type or of the Sharia.[36]

Under the legal receptions in the Sharia from the West, it is clear that the West has been largely adopted and the adoptation continues as such, by the Muslim countries. But it should be kept in view upon a review of the nature and sources of the Sharia theory itself that any sharp reform adopted from the West should be avoided and any outright break with past traditions should not be taken.[37] The problems of today, confronted by the Muslim countries aim at the establishment of a system of guaranteed individual liberties, which still remain complicated. The Quran and the traditions of the Prophet provide for it by salutary

34 See Ter Haar, Adat Law in Indonesia (1948); The Netherlands East Indies Civil Code of 1847.
Ibid; Leyser, Legal Developments in Indonesia, 3 Am. J. Comp. L. 399 etsq, (1954); Schiller, The Formation of Federal Indonesia, 1-4, 308-38 (1955); for Philippine, see MacClintock, Mohd. law in our Philippine possessions, 17 Law student's helper, 378-382 (1909).

36 See Schlesinger, 196; The Symposuim on the Future of Customary Law in Africa (Leiden, 1956); Anderson, Islamic Law in Africa (1954); Jl. of African Law (since 1957); Abraham, The Colonial Legal service and the Adm. of Justice in Colonial Dependencies, 30 J. Comp. L and I. L. 3rd. Series III-IV. 1, 8-9 (1948). Gluckman, The Judl. Process Among the Barotse of Northern Rhodesia (1955).

37 Ref. Prof. Coulson, The State and Individual In Islamic Law, 6 I. & Comp. L. Q. 49 etsq. (1957).

Law and its Institutions

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37 Ref. Prof. Coulson, The State and Individual In Islamic Law, 6 I. & Comp. L. Q. 49 etsq. (1957).

procedures, yet the Muslim legal modernism is getting a due place in history; upon a review of the Islamic history as a whole along with its present developing shapes, it has been observed that, "A body of positive legislation has grown up in every Muslim country side by side with the sacred law. And since the Ummayad Dynasty came into power in 661 A. D., the rulers of the Islamic country have pursued a *Siassa-Madania* or secular policy as opposed to *Siassa-Sharia* or the policy of divine origin. Since that date the Islamic theocracy has existed only in theory as an ideal, a city of God, to use expression of St. Thomas. Indeed after World War I, Mustafa Kamal of Turkey achieved the complete separation of Church and State." [38] But whatever and whatelse be the theory of social change and the modern impact of the West, "the element of human interest provides a greater substratum than does the logical structure of the Law. Comparative law frequently illustrates that, while the legal of the two systems may be as far apart as the poles each may be forced for reasons of convenience so to modify the application of its theoritical basis that ultimately the practical results are not far removed. Many decisions on the *Lex-Aquila* are surprisingly similar in effect to those of English Law of Tort. German law adopted a subjective theory of contract, English an objective, but each has been forced to adapt its theoritical basis to the needs of commerce. In-spite of differing theories, the English and Roman rules of possession were built up under the pressure of needs and circumstances which cannot have been wholly dissimilar". [39] The similar may be the case of Islamic law and its institutions, if reviewed as a way of a comparative

38 Prof. Saba Habachy, Islam: Factors of stability and change, 54 Col. L. R. 717 (1954).

39 Paton 23-24 citing Dig. 9, 29, 4; Gutteridge, Comparative Law, 49 (2nd Ed.); Schuster, Principles of German Civil Law, 92; Holdsworth, VII. 460.

method of legal research, for it is more explicit that the Sharia has itself inherent principles of the requirement of the rule of human conduct, though the lack of proper incentive of research in the modern writers leave it in the way for major receptions from others without inquiring into the Sharia rules first. Further, the suggestion is made that, "the element of human interest leads to indentical solutions in the case of every system. Even over a period of one hundred years the Common law shows surprising changes. The argument in the text is only that the pressure of social needs will frequently explain what, from the point of view of the logic of the law, may be a mere anomaly," [40] and upon it the readers may themselves take an impartial view about the Islamic Sharia.

However, under the above light, it may be submitted that the Sharia has its due place in the conflicting world of today. It is a system, which stands challenges of the time and remoulds itself with the changing times and conditions though with some slackness which remains inherent in every legal system. "The creative development of Islam as a religion on earth lies rather in the hands of those Muslims whose concern for the forms and institutions evolved in Islamic history is subordinate to their lively sense of the living, active God who stands behind the religion,

It is said that ,the some elements of the Civil or Roman Law influenced the Islamic Legal institutions, see Prof. Fitzgerald, The Alleged Debt of Islamic to Roman Law, LXVII. L. Q. R. 81 etsq. (1951); note for an interesting analysis, Prof, Anderson, The Sharia and Civil Law, 1 Islamic Quarterly, 29 etsq. (1954); Prof. Schacht, Foreign Elements in Ancient Islamic Law, Jl. of Comp. I eg. & Int. Law 3rd. Series, Vol. XXXII, 9 etsq, (1950); Dr. Jung, the Roman-Muslim Law, 23 A. L. J. 1-8 (1925); see also Ion, Roman law and Mohd. Jurisprudence, 6 Michigan L. R. 44-52, 197-214, 371-396 (1908); Isaacs, Analogies in Islamic and European law, 6a Am. B A.J. 158-160 (1920); Mahmassani, Philosophy of Jurisprudence In Islam, Ch. V. (1961).

40 Paton, 24; Holdsworth VII. 460.

and to their passionate but rational pursuit of that social justice that was once the dominant note of the faith and the dominant goal of its forms and institutions".[41]

With all the modern developments of the Sharia and its receptions, however, "there is still one sphere in which the secular power has no jurisdiction. This is the sphere of conscience in which the ideals of Islam will continue to live in-spite of all compromises dictated by the temporal opportunism,"[42] for, "Islam that was given by God is not the elaboration of practices and doctrines and forms that outsiders call Islam, but rather the vivid and personal summons to individuals to live their lives always in His presence and treat his fellowmen always under His judgment."[43] Islam being a way of life, stands and may fall with the Supremacy of the Sacred Law, and anyone who wants to dethrone it without practical issue in social relations will always give rise to a strong opposition as it happened in the past times.[44] It is inherent in the nature of Islam that it, "deprecates the spirit of exaggeration, the right path for orthodox community is to keep the forces of conservatism and forces of progressiveness in equilibrium," as, "both are necessary for the preservation and continuity of Islam, without the former, Islam would lose its character and succumb to dangerous heresies, without the latter, it would lose touch with the changing conditions of life."[45] The laments of Ameer Ali expressed years back is still applicable upon the conditions of the community in general. He said that, "The Moslems of the present day have ignored the spirit in a hopeless love for letters. Instead of living

41 Prof. Smith, 308.
42 Prof. Saba Habachy, 717.
43 Prof. Smith, 308,
44 See Gibb, 145; for Islamic revival, see Lewis, Islamic Revival in Turkey, 28 Int. Affairs, 38 etsq. (1952).
45 Prof. Saba Habachy, 712.

upto the ideals preached by the Master, instead of striving to excel in good works", of being righteous', instead of loving God, and for the sake of His loving creatures - they have made themselves the slaves of opportunism, and outward observance."[46] It is submitted that the Muslim community will judge itself, as to what extent the views, of Ameer Ali are applicable to them in the conflicting modern world of the mid-twentieth Century[47].

As a re-evaluation of the Islamic Sharia in the light of the modern researches and developments as a whole, it can be predicted that the future shapes of the law will be in the forms of receptions in the unprovided for and hardship matters to fit it more with the trends of the modern thoughts and ideologies, but, so far the main structure is concerned the fundamentals of Islam will be maintained. It has been recently observed that, "Broadly speaking, all these present day development take the form of legislation which introduces, with the force of statute law partial or complete codification of those part of the Sharia which are actually not based on the views of all or any of the Sharia law, mutually recognized as orthodox in Islam today, but rather on an eclectic principle of choosing the rules which seem most suited to modern life from the dicta of any recognized school or reputable jurist. This has sometimes before the formal school crystallised, but also those of extinct schools such as the Zahiris, of some what eccentric jurist such as Ibn Tayima and Ib Qayyim al Jawzia, and even of the conclusions of 'Schismatic' schools such as those of the Zaydi and Jafri subjects of the Shia. In addition, the views of two more jurists have often been combined in a single matter as to produce a result which

46 The Spirit of Islam, 182.
47 It should be noted that Ameer Ali believed in the Muatazila or the Rationalist school of thought: see his Mohd. Law II. (Preface, 5th. Ed. 1929).
48 Prof. Anderson in the Muslim World XL. No. 4, 214; (see also his

is in effect wholly new".[48] It is submitted that though new principles may be introduced in the Sharia, yet, the future of the Islamic law will be a retention of that which is fundamental in it, and with the revival of such fundamentals, Islam will become more valued for the changing notions of time. The Muslim Community will have to realize that its rules of human conduct depend upon the doctrine of self-preservation for the ways of God, by way of adjustments with changed notions in the bounds of the Divine limits, in order to re-evaluate its inherent purity and refined ideas with dynamic power. If the community so acts it will remain in the forefronts of the conflicting world of spacism, within the campaign of the survival of the fittest.

other articles from Oct. 1950 to Oct. 1952 in the Jl.); see also his articles in Am. J. of Comp. L. Vol. for the year 1961.

APPENDIX

I. LIST OF WORKS AND STATUTES REFERRED TO

(It should be noted that this list is merely a selection of the vast material on the Islamic law and Jurisprudence).

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II. CASES CITED

A. CASES RELATING TO ISLAMIC LAW

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B. OTHER CASES

B. Other Cases

Note :— The above list is not exhaustive, as various authorities may be noted throughout the book.

III. GLOSSARY OF TECHNICAL TERMS

A

Aadaabul-Qadi:-Law of Procedure of Courts
Ahad:-Single testimony
Ahliat:-fitness
Ahsan:-best
Ahlu-ladl-wal-tawhid:-true muslims
Ahlu-l-sunna-wal-jamaa:-sunnis
Ahl-Hadith:-followers of traditions of the Prophet
Ayn:-determinate property
Al-adillat-al-qatiyya:-absolutely sure arguments
Al-adillat-al-ijihadiyya:-argument obtained by exertion
Al-am-rul-bilyad:-thy business is in thy hand
Al-hizanat:-custody of minors
Al-Ikhtiar:-chose thyself
Al-Khulafai-Rashedun:-The Enlightened caliphs
Al-mashiat:-if thou wishest
Al-Sharra:-the law
Amin-al-Hukum:-an official to safeguard and administer an orphan's property
Aqd:-contract
Ariyat:-Commodate loan
Asbah:-Companions of the Prophet
Asbah-al-Takhrij:-masters drawing real law
Ashab-al-Tarjih:-masters having authority to show preference
Ashab-al-Tashih:-masters having authority to say a a law as weak or strong
Aul:-doctrine of increase
Awarid:-defects
Ayan:-determinate
Azimat:-strict Law

B

Bai:-sale
Bain:-complete
Bait-al-Mal:-public treasury
Batil:-void
Bawwab:-door-keeper
Budee:-irregular

D

Dafa:-avoidence
Darul-harab:-territory of war
Darul-Islam:-territory of peace
Dawa:-claim
Diat:-compensation
Dimmi:-scripturaries
Dhawal-arham:-Distant Kindered
Dhawul-farud:-sharers in inheritance

E

Eela:-swearing

F

Faalia:-appurtainig to the person making the contract

Fard:-obligatory
Fasid:-irregular
Faskh -revocation
Fiqh:-science of jurisprudence
Firkut:-separation
Fuqaha -legal experts
Futya:-institutions giving legal opinions or fatwa

G

Ghairu-manqul:-immovable property
Gha ab:-usurpation
Ghayia:-same result
Ghermuqallid -those who do not follow any Imam.

H

Hadith-al-Ahhad -isolated tradition
Hadith-al-Azir:-strong tradition
Hadith Daif -a tradition whose narrator remains of questionable authority
Hadith-al-Gharib:-unfamiliar tradition
Hadith-al-Hasan -tradition from persons not so pious but nothing known against their integrity
Hadith-Manqul:-restricted tradition
Hadith Marfa -exalted tradition
Hadith Muallaq:-incomplete or disconnected tradition.
Hadith Munqata:-tradition having name of narrator missing
Hadith Mursal:-name of narrator missing at end in the tradition
Hadith Mashhur:-well-know tradition
Hadith-al-Qudsi:-tradition embodying revelation form God in the language of the Prophet
Hakam:-arbitrator
Hakim:-legislator
Haq:-right
Haqiqi:-actual
Haququl-Allah:-Rights of God
Haququl-Ebad:-Rights of the people
Haququl-majra:-right to flow water
Haququl-masil:-Right to discharge rain water over other's land
Hawala:-novation
Hazir-Zaminee:-bail for peson
Heba or Hiba:-gift
Hiba-bil-Iwaz:-gift with an exchange
Hiba-ba-shartul-Iwaz:-gift with a condition for exchange
Hijra:-Muslim calender year
Hissi:-an act of body or mind

Hukum:-law
Hukmi:-symbolical

I

Ifta:-legal opinion
Ijab:-proposal
Ijara:-hire
Ijma:-consensus of opinion of scholars
Ijma-al-Umma:-concensus of scholars on points of details
Ijma-al-Umma:-consensus of all muslims
Iqala:-revocation of a contract by common consent of the parties
Ijtihad:-a lawyer's opinion from an opinion
Ikrah:-coercion
Illah:-rendering lawful
Ilmul-faru:-branches of jurispendence
Iman -faith
Imamut or Imamate:-headship
Iqrar:-admission
Irsh:-compensation
Istihsan -juristic equity
Istihbab:-seeking a link
Istislah:-aim of mankind in law
Isthbatat:-creative acts
Isqatat:-extinguishing rights

J

Janayat:-tort or injury

K

Kafeel:-surety
Kafalat:-suretyship
Kahn-kul-al-shuraka:-joint tenancy
Karabut:-relationship
Khalf:-succession
Khanqah:-monastery or religious institution
Khayarul-bulugh:-Option of puberty
Khayarush-shart:-stipulation for revocation of a contract
Khayar-ul-taqhrir:-revocation of a contract on fraud
Khazin Diwan Al-Hukm -an official entrusted with safe keeping of Court archives
Khusumat:-possession
Khula:-mutual separation
Kitabia:-people of Book
Kismat:-partition

L

Lian or Laan:-mutual imprecation

M

Ma-alaih:-subject to
Maasilat:-wrongs causing violations of public rights
Maddia:-proposal and acceptance
Mahr:-dower
Mahrul-mithal:-customary dower

Mahall-al-aqd:-objects of a contract

Mahkum-Bihi:-objects of the law

Mahkum-Alaihi:-application of the law (to general mankind)

Ma'jjal:-prompt

Makfool-be-hoo:-claimant

Makfool-be-hee:-claim

Makruh:-improper act

Mal:-property

Mal-zaminee:-surety for property

Milk:-ownership

Milkul-raqba:-proprietory rights

Milkul-tasarruf:-right of disposition

Manafa:-usufruct

Mithli -similar

Moda -trustee

Modee:-depositor

Mohoob:-gift

Mohoob-l-hoo:-donee

Muamalat:-related dealings among men

Mubah:-permissible act

Mubarat:-mutual agreed separation

Muddai:-plaintiff

Mudda-alaihi-defendant

Mujtahid:-jurist

Mujtahid-fil-Shara:-supreme jurist

Mujtahid-fil-Masail:-jurist deducing law by own ijtihad

Mujtahib-fil-Mazhab:-Jurist of a school

Munkuhat:-matrimonial relations

Muqaladoon:-learned men

Mustahab:-commendable act

Muta:-temporary marriage

Mutawalli:-trustee

Muwajjal:-deferred

N

Nafqah:-maintenance

Naql:-transfer

Nikah:-marriage

Nusub:-parentage

Q

Qubul:-acceptance

Qanun-al-Fitrat sahiha:-moral law

Qanun-al-Mumlukat:-general law of state

Qanun-al-Shahadat:-law of evidence

Qarinat:-circumstantial evidence

Qimi:-dissimilar

Qiyas:-analogy

Qiyas Jali.-strictly logical anology

Qiyas Kafi:-analogy based on spirit of revealed laws

R

Rahn:-pledge

Ruqba:-right to usufruct

S

Shafi:-pre-emptor

Shafii-jar:-neighbour

Shafii-Khalit:-participator in immunities

Shafii-sharik:-co-owner in property

Shahih:-Valid.

Sharia:-sacred law.

Shahadul-al-shahadut:-evidence of testimony

Shrakat-ul-aqd -partnership by contract

Shirakat-ul-Aiman:-partnership in traffic

Shirakat-ul-Milk:-partnership by right of property

Shirakat-ul-Sinnaia:-partnership in art

Shirakat-ul-Woodjooh:-partnership upon personal credit

Shufa:-pre-emption

Shubahatul-fail:-where the offender misconceived the law

Shubahatul-mahal:-error in the application of the law

Siassa Madania:-secular policy of state

Siassa Sharria-policy of divine origin by state

Soolh -compromise

Suaria:-outward manifestation

Sunna:-Custom, tradition or model behaviors

Sunnat-al-Fil:-the doing of the Prophet

Sunnat-al-Qaul:-the sayings of the Prophet

Sunnat-al-Taqrir:-the doings of others in the presence of the Prophet without any objection on his part

T

Tabiun:-successors of the companions of the Prophet

Tafwiz:-delegation of power

Talaf:-injurious

Talaq:-divorce

Talabi-ishhad:-demand on novation of witnesses

Talabi-Khusumat:-demand of possession

Talabi-mowasibat:-demand on jumping (for pre-emption)

Talabi-takreer:-demand on novation of witnesses

Talabi-tamlik:-demand of possession

Tahkeem:-arbitration

Taghrir:-fraud

Takia:-graveyeard

Tamul:-custom

Tamlikul-ayan:-a transfer of right of property in substance

Taqlid:-following other's opinion

Tassarufat:-expenditure of a person's will or energy

Tawatur:-Universal testimony
Tazir:-judicial discretionary punishmeut

U

Usul-al-fiqah:-science of jurisprudence
Urf:-custom or practice

V

Vakalat:-agency

W

Wadi:-bad
Wadiyat:-deposit
Wahib:-donor
Wajib:-obligatory
Wakf:-pious dedication
Wasiyat:-bequest
Wikalit-ba-Nikkah: agency in marriage
Wilayet-ul-ijbar:-patria potestus
Wujub:-duties

Z

Zakat:-alms-giving
Zihar:-divorce by comparing

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